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A TREATISE

ON THE LAW OF

Court Practice and Procedure

CIVIL AND CRIMINAL

And Procedure Preliminary and Incidental Thereto
Under the Code

BY

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"If there is anything eminently and exclusively
our own, it is our system of legal procedure."

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PREFACE.

This volume, covering a new field for a book, local in its nature, is now offered as a companion to the author's "Code Pleading" and "Instructions and Entries."

The language of Justice Ranney in *Ellis v. Insurance Company*, 4 Ohio State, 628, 645, to the effect that: "If there is anything eminently and exclusively our own, it is our system of legal procedure," expresses the idea of this book.

It treats upon all questions of Practice, from the filing of the first pleading, or from the formation of the issues to the termination of the action, in the *nisi prius*, and the appellate, or reviewing courts. It deals with matters preliminary, such as The Time of Commencing Actions, Jurisdiction, Process, &c., following which is a discussion of the modes of trial considering all questions relating thereto. Then follows Judgment, Execution and Sale, &c., Appeal and Error. The book is named "Court Practice," which embraces everything that is or may be done in court from the commencement to the final termination of a cause, and hence comprehends more than is usually understood by "Trial Practice."

E. B. K.

COLUMBUS, Ohio, January, 1900.

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I.

Introductory.

OHIO COURT PRACTICE.

CHAPTER I.

TRIAL PRACTICE—A DISTINCTIVE SUBJECT—ITS STUDY.

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1. Trial practice comprehends what.
2. A book on practice.
3. Success in the practice.
4. The study of practice.

SECTION. 1. Trial practice comprehends what.—When we speak of the Practice of the Law, the law of pleading is not usually comprehended therein. The two subjects are usually treated separately. Lawyers frequently speak of a book on pleading as a book of practice, which is not technically correct, as pleading and practice are distinct subjects.

The term "practice" is very general; it includes all of those acts, and the manner of doing them, necessary and proper to the due prosecution and defense of a suit in a court of justice. The definition to embrace all of the particulars must necessarily be very general, for the particulars run out into an astonishing variety, and are to be found enumerated under the various divisions and sub-divisions in the books of practice.[1]

Practice really begins with the ascertainment of the facts, and includes the drafting of the pleadings, preparation for trial, the conduct of the trial in all the courts where it may be tried. Pleading, then, is one step which may be included in our definition of practice.

SEC. 2. A book on practice.—Many years ago the rules and principles governing the practice of the law were not found in the reports of cases, but now almost every question which can possibly arise with reference to the trial of a case has been raised and settled. There are, however, many simple rules and customs which do not appear in the books, but which may be said to lie behind the cases, trials and arguments. The old and experienced practitioner may not be so much interested as

[1] Lube's Eq. Pl., 11.

the beginner, and still there is much that may be said and gathered together in a volume like this that will instruct the old as well as the young.

Mr. Bishop, in his First Book of the Law (Sec. 598), said that: "Our country is so cut up into States, each having its own peculiar practice, that we have not had a general book of American law practice, and it is impossible any book should be written. There are some general principles which run, and must run, through every system of legal practice; and an author, sufficiently skillful, might do an excellent service by culling out these, and presenting them, detached from local rules and local usages, for use everywhere. . . . There is a science in law practice, but it has not yet been developed by any writer."

Since this was written by Mr. Bishop we have had excellent works treating American law practice by men of well recognized experience and ability. These books have served a most useful purpose to the Bar, and could not be dispensed with, but they have been confined to the general principles which must run through every system of legal practice. Many local rules and usages are attached to the general principles, and while most all of the general principles may there be found, the local rules and usages and especially statutes are not there.

In this volume it is the aim to have all those general principles and rules concisely grouped with local rules, customs and statutes for use by student and practitioner.

It is also the purpose to meet the wants of two classes of practitioners, the beginner and the experienced one. The wants of the former will be subserved by treatment of many matters of practice gained only by experience; those of the latter, by rules, usages and statutes which are not learned so readily by experience, and which do not so readily find lodgment in the memory.

Sec. 3. Success in the practice.—Success in the practice of the law is the goal which all seek to reach, but there are many failures. Again some may excel in one line and others in different lines. Mr. Reed, in his Practical Suggestions, uses a familiar and oft-expressed thought: "Neither the ablest judge nor the most renowned law-writer has always been a good lawyer, that is, a successful practitioner." There are reasons for this. It is not always the best lawyer who is what we commonly consider a successful practitioner. In many cases it is largely a matter of chance, and altogether due to condition and circumstances. In very many cases the one who makes the most money—and hence succeeds,—is not as good a lawyer,

nor as adept a practitioner, as the one who makes a lesser amount of money, and consequently does not succeed so well in one sense of the term. To succeed in the sense of making money, the practitioner must give the practice his first and only attention. He cannot engage in other fields of enterprise. The reasons why the able judge, or the renowned law-writer, and others have not been successful practitioners, may also be because of chance, conditions and circumstances not reflecting upon their ability. There is certainly every reason why the able judge and law-writer would make a good practitioner, if they were to devote their time and attention assiduously to the practice.

There are so many qualities and elements that go to make a successful practitioner, and they are so unevenly divided, that it seems quite impossible for all to possess them, just as it is impossible for all to be millionaires.

A successful practitioner (not in finances) cannot attain that rank unless he is a good lawyer. "There can be, it is true, no able conduct of a case, without a comprehensive and sound knowledge of the law, but this knowledge, it is seen, is not of itself sufficient."

A thorough knowledge of the law without the ability to put it into practice in the commencement and successful prosecution of actions in courts, is as no knowledge at all. A recent writer repeated an old expression: "Skill in practice is one of the signs of a good lawyer" (Munson, Sec. 25). Whether or not a man is destined to be a good practitioner can generally be seen in advance. The student generally shows in advance whether or not he will be able to put into practice the knowledge which he is gaining. As a matter of fact, the student and the beginner gains a knowledge of practice at the same time that he is learning the law. When he is studying cases to master the principles which they enunciate, he learns the steps in the procedure by which these principles are established. At one time our schools did not devote much time to pleading and practice, but this is now changed. The practical part of the law is now receiving that attention which it deserves, and students who now graduate from our schools ought to be fairly well equipped for the practice.

Sec. 4. The study of practice.—The fact that the expert trial practitioner is one of the most prominent figures at the bar, is a reason why students should make a thorough study of this branch. It has been stated by one authority that an attempt to make a man a lawyer without thoroughly teaching him the rules and principles of practice and procedure, is like attempt-

ing to make a man a sailor without teaching him the science and principles of navigation.

It has been a sadly neglected subject in the student's life. It is said that it is a difficult subject to teach, which "but emphasizes the necessity of teaching it, for the learning is as indispensable as it is hard to obtain. It is the crooked places the teacher is called upon to make straight and the rough places made plain." Teacher and student must constantly bear in mind the necessity of working out the principles of substantive law *practically;* it must be clear that the principle of substantive law can be successfully carried out, before the same can be considered mastered; then practice will be learned with substantive law.

II.

Matters Preliminary.

CHAPTER II.

TIME OF COMMENCING ACTIONS—STATUTES OF LIMITATION.

SEC.

5. The design of chapter.
6. Nature and origin of statutes of limitation.
7. The statute in law and equity.
8. Construction of statutes of limitation.
9. Construction of exceptions and saving clauses.
10. Retroactive operation.
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12. Extension of unexpired limitation.
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38. Proceedings to revive judgment.
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69. How to take advantage of.
70. By whom taken advantage of.
71. Pleading statute after rule day.
72. Questions to be submitted to the jury.

Sec. 5. The design in this chapter is.—Merely to give a general, concise outline of the law governing the limitation of actions with especial reference to the Ohio Code, as the subject covers so large a field that nothing more can be expected in this work. Only such matters and cases are brought into the chapter from other States as may seem necessary to further elucidate our Code. The law of limitation of actions is governed by statute, and the statutes of various States do not in all cases prescribe the same period of limitation for the same subject, in which case such cases could only aid in determining what class of cases comes within the special statute, looking to the local statute.

Sec. 6. Nature and origin of statutes of limitation.—There was no limitation as to when an action could be brought at common law. Statutes of limitation are of statutory origin. There were, however, certain rules established by the authority of precedent in equity by which it was presumed after a certain length of time that a debt had been paid. This principle was afterwards engrafted into the common law.[1]

The original idea was that the statute was designed for the protection of the individual, and it was in earlier times considered as an unconscientious defense, courts studiously attempting to evade the statute for this reason. It was presumed that if the party delayed securing his remedy for so long a period that he had no rights in the premises, else he would have prosecuted his claim with more diligence.[2]

Judicial opinion is, however, very materially changed with reference to this matter. It has been considered according to the more modern view that the design of the statute is not alone the protection of the individual, but it is founded upon other well defined principles; that it is carrying out the principles of the maxim: *nam leges vigilantibus, non dormientibus subveniunt;* that it was not designed merely to raise a presumption of the payment of a just debt from lapse of time, but to afford security against stale demands after the transaction may have been entirely forgotten. In the language of Justice Story: "Statutes of limitation are founded on sound policy, and are statutes of repose, and are not to be evaded by the force of construction. Statutes of limitation instead of being received in an unfavorable light, as an unjust and discreditable defense, should have received such support from courts of

[1] Gregory *v.* Com., 121 Pa. St. 611; Bean *v.* Tonnele, 94 N. Y. 381.

[2] Statutes of limitation proceed on the presumption, from lapse of time, of the release of rights, or the presumption of their abandonment from *laches.* Wood *v.* Ferguson, 7 O. S. 292.

justice as would have made them what they were intended emphatically to be, statutes of repose."[1]

During the period that the statute was regarded in such an unfavorable light, courts would not permit a party to file a pleading after the time for filing the same had expired, but under the view now taken the court may in the exercise of sound discretion permit a defendant to file an answer pleading the statute out of time or rule day.[2] But the statute does not cancel the debt;[3] otherwise it could not be and does not form part of any contract.[4] It is elementary that statutes of limitation only affect the remedy which a party may pursue, and not the validity of the claim. It is a mere personal privilege which is extended to an individual that may or may not be interposed by him if he chooses; he may waive it either by failing to take advantage of it when the remedy is invoked, or by a new promise, no one but the party himself having the right to take advantage of it.[5]

Sec. 7. The statute in law and equity.—It has long been established that equity will refuse its aid independently of the act of limitations, after great lapse of time. Reasonable diligence must be exercised in asserting their claims by those who seek the active aid of a court of equity.[6] Where courts of equity and law have concurrent jurisdiction the rule is that courts of equity are bound by the statutes of limitation the same as courts of law, and the equitable action is barred in the same length of time as the action at law.[7] There are also other cases not of concurrent jurisdiction in which the statutes of limitation are applied by courts of equity by way of analogy to the law, in which courts of equity follow the law, and give effect to its regulations upon equitable titles.[8] In this last class of cases equitable exceptions may well be admitted

[1] Bell *v.* Morrison, 1 Peters, 360.

[2] See section 71, *post.* Freeman *v.* Hill, 45 Kan. 435. Trial courts in Ohio have even permitted answers to be withdrawn and a demurrer interposed raising the bar of the statute.

[3] Taylor *v.* Thorn, 29 O. S. 569; Belknap *v.* Gleason, 11 Conn. 160.

[4] Hogget *v.* Emerson, 8 Kan. 262.

[5] 2 Pinkead's Code Plg. 1146, see also Allen *v.* Smith, 129 U. S. 465; Waterman *v.* Manufacturing Co., 14 R. I. 43.

[6] Tuttle *v.* Wilson, 10 O. 24; Webster *v.* Bible Soc., 50 O. S. 18. See 13 Am. & Eng. Enc. of Law, p. 680.

[7] Webtser *v.* Bible Society, *supra*, 11; Paschall *v.* Hinderer, 28 O S. 577; Pratt *v.* Northan, 5 Mason, 95; Hovenden *v.* Lord Annesley, 2 Sch. & Lefroy, 607, 630; Kane *v.* Bloodgood, 7 Johns. Ch. 90.

At common law statutes of limitation applied to the forms of the action at law and contained no provisions concerning equitable proceedings. If a party had concurrent remedies, one at law, the other in equity, courts of equity applied the limitation prescribed for the action at law. But in all other cases they were said to merely act in analogy to the statutes and not in obedience to them. Chick *v.* Willetts, 2 Kan. 385.

[8] Smith *v.* Wood, 42 N. J. Eq. 563; People *v.* Everst, 4 Hill 71.

and justified, because the bar is furnished by the court itself, and stands on no positive legislation.[1]

The distinctions between actions at law and suits in equity being abolished, the statutes of limitation apply equally to both classes. They apply to the subject matter and not to the form of the action.[2]

Sec. 8. Construction of statutes of limitation.—The light in which statutes of limitation are now viewed is quite different from that in which they were considered formerly. It is no longer the habit of courts to look with disfavor upon the plea of the statute of limitation. Instead of being considered as an unconscionable defense, they are now regarded as statutes of repose, designed to secure the peace of society and protect individuals from being prosecuted upon stale claims, and are, therefore, construed in the spirit of their enactment.[3] And so far as they are statutes of repose they are not to be evaded by construction.[4]

Although the statute of limitation is considered a meritorious defense, yet for certain reasons it must receive a strict construction at the hands of the courts. As a learned author has well said: "It operates rather harshly upon the rights of the creditors, and the debtor who permits a claim or a right to be

[1] In a court of equity, the statute has no binding force by its own effective force, but is only adopted and applied by analogy to cases within what is considered its reason. Bigelow *v.* Bigelow, 6 Ohio, 96; Larrowe *v.* Beam, 10 Ohio, 498; Gibler *v.* Trimble, 14 Ohio, 323, 343.

It is only where the court is unable to act in analogy to the statute of limitations, that it proceeds merely and exclusively upon the staleness of the demand. Larrowe *v.* Beam, 10 Ohio, 498, 503. Except in a few cases a statute of limitation is as available in equity as at law. Scott *v.* Hickox, 7 O. S. 88, 93.

[2] Chick *v.* Willetts, 2 Kan. 385.

[3] Townsend *v.* Eichelberger, 51 O. S. 216. "Of late years the courts in England and in this country have considered statutes of limitation more favorably than formerly. They rest upon a sound policy and tend to the peace and welfare of society. The courts do not now, unless compelled by the force of former decisions, give a strained construction to evade the effect of those statutes. By requiring those who complain of injury to seek redress by actions at law within a reasonable time, a salutary vigilance is imposed and an end is put to litigation." McCluny *v.* Silliman, 3 Pet. 278. The statute is now regarded more favorably and considered as one of repose. It is a meritorious defense, and may be pleaded in equity as well as at law. Kinkead's Code Pldg. Sec. 1146; Spear, J. in Treasurer *v.* Martin, 50 O. S. 203, said: "Now it may be freely conceded that the statute of limitations, where applicable, is a meritorious defense, and one which may be pleaded in equity as well as at law. Nor will a court of equity, where the demand is of a legal nature, refuse to recognize such defense, nor to enforce it where fairly obtained. So, if from the *laches* of the other party, the defense has arisen, its sufficiency pleads as well to a court of equity as to a court of law." The statutes were introduced "for quieting of men's estates and avoiding of suits" by depriving the remedial right of its judicial remedy reduces it to the position of a merely natural obligation, which however still remains capable of supporting a lien or pledge. Holland's Jur., p. 295.

[4] McCarthy *v.* White, 21 Cal. 495; Dickinson *v.* McCamy, 5 Ga. 486; Hart's Appeal, 32 Conn. 520.

utterly destroyed by reason of his own neglect, certainly should receive no more favor than the strict letter of the law will extend to him." This is the consideration which requires a strict construction.[1] It being the rule, therefore, that the letter and not the spirit of the law controls, the court cannot by a process of construction extend the law to cases that do not come clearly within the letter.[2] It is not the province of the courts to make exceptions to meet cases not provided for by the legislature.[3] The more general rules of statutory construction applicable to other statutes also apply to those under consideration; hence the sections relating to the same subject matter should be read and considered together, without reference to the particular article or heading under which it may be placed;[4] the general words of a statute are to receive a general construction,[5] and where the statute on its face is free from ambiguity the court will not give it any other construction than that which their words demand.[6] The general rule is that all persons, whether under disability or not, are barred by them unless excepted from their operation by a saving clause; and unless there is found in the statute itself some ground for restraining it, it cannot be restrained.[7]

Sec. 9. Construction of exceptions and saving clauses.—The rule governing the construction of exceptions or saving clauses in statutes of limitation has been very well considered in a recent case. It is said that in the absence of a saving clause or exception, the statute runs against all persons whether under a disability or not. And where there is a saving clause it runs alike against all who cannot bring themselves clearly within some one of the excepted clauses. The general provisions of the statute are restrained only so far as there are express words of exception; and it is therefore incumbent on those who claim the benefit of the exception to show that they are in all particulars within its descriptive terms and conditions. And where the statute has created specific exceptions, all others must be deemed excluded. The courts are without authority to enlarge or change those specified, or establish others, though in particular cases the ends of justice might more properly be subserved

[1] Jones *v.* Jones, 41 O. S. 417; Sutherland Stat. Const. Sec. 368. They are the creatures of positive law and are construed strictly. 9 Ill. 193; 15 La. Ann. 143; 61 Pa. St. 369; 2 Sneed. 347.

[2] Bucklin *v.* Ford, 5 Barb. 393.

[3] Endlich's Interp. of Stat., Sec. 17; McIver *v.* Regan, 2 Wheat. 25; Lane *v.* Bank, 6 Kan. 75.

[4] State *v.* Popp, 45 Md. 432.

[5] Chancellor Kent, in Demarest *v.* Wynkoop, 3 John. Ch. 129; Lane *v.* Bank, 6 Kan. 75; Favorite *v.* Booher, 17 O. S. 548; Powell *v.* Koehler, 52 O. S. 119.

[6] Scott *v.* Hickox, 7 O. S. 88, 94.

[7] Favorite *v.* Booher, *supra.*

if it were done. Exceptions in favor of persons under disability, are strictly construed, and are never extended beyond their plain import.[1]

Sec. 10. Retroactive operation.—One of the exceptions to the operation of the statutes of limitation is that its provisions do not apply to actions already commenced, nor to cases wherein the cause of action has already accrued. The statute in force at the time the action accrued is applicable in such cases according to the subject of the action, without regard to form.[2] It is governed by the statute in force when the right accrued.[3] In this country, says an old standard authority, statutes of limitation are not retrospective, applying only to causes of action that are to commence in the future, so that there is no interference with vested rights or the obligations of contracts. They establish a presumption that the lapse of a certain length of time is evidence of a transfer of property or that a contract has been performed rather, than to take away the one and to dispense with the other.[4]

Sec. 11. Vested rights acquired under statute. — Causes of action accruing under laws repealed, if barred by such laws while in force, continue barred by them ; if not barred during their continuance, shall nevertheless be limited by them.[5]

When once a right is barred, it becomes a vested right just the same as any other right which cannot be impaired, and cannot be revived by subsequent legislation operating retrospectively. The legislation to affect the right must be remedial, and express provision must be made in the amending act.[6]

[1] Powell *v.* Koehler, 52 O. S. 103. It was said by Chancellor Kent in Demarest *v.* Wynkoop, 3 Johns. Ch. 129, 142, that: "The doctrine of any inherent equity creating an exception as to any disability, where the statute of limitations creates none, has been long, and, I believe, uniformly, exploded. General words in the statute must receive a general construction, and if there be no express exception, the court can create none." "In a few instances, courts have apparently made exceptions not found in the statute; but they are only such as arose from a state of war, or other imperative necessity, as when the courts are shut, or by act of law one party is forbidden to sue, or the other is rendered incapable of being sued." Williams J., in 52 O. S. 119.

[2] R. S., sec. 4974.

[3] Webster and Bible Society, 50 O. S. 1.

[4] Angell on Lim. sec. 22 (6th ed.).

[5] Bigelow *v.* Bigelow, 6 O., 96–7.

[6] Schurman *v.* Drayton, 14 O. C. C. 328; Rockport *v.* Walden, 54 N.H. 167; 20 Am. Rep. 131; Reformed Church *v.* Schoolcraft, 65 N. Y. 134. The court said, in Ryder *v.* Wilson, 41 N. J. L. 9: "The decisions of the courts, so far as my research has extended, are wholly in accord on this subject, and with one voice they declare that when a right of action has become barred under existing laws the right to rely upon the statutory defense is a vested right that cannot be rescinded or disturbed by subsequent legislation." See also, Simonds *v.* Simonds, 103 Mass. 572.

In construing statutes of repealing acts of limitation, the rule is to avoid, if possible, that construction which will deprive a party of their benefit where they have already become a bar, but where the act of legislature will not

Such legislation, or a contrary rule, would result disastrously to titles, as statutes of limitation may operate to vest title, in which case they should not be disturbed.[1]

And so is the right to institute and *maintain* an action which accrues under existing law a vested right, and is not curtailed, abridged, or in any way affected by subsequent legislation, unless it is remedial, and not then unless express provision therefor is contained in the amending act.[2]

Sec. 12. Extension of unexpired limitation.—A limitation may be extended if it has not already expired; but a claim barred by a former statute cannot be revived by a subsequent act.[3]

Sec. 13. Cause of action must accrue to set statute running.—The cause of action must accrue before the statute of limitations will apply.[4] The term—cause of action—implies not only a right of action, but also that there is some person in existence who is qualified to institute proceedings.[5] It was never intended to apply to claims for the recovery of which the party entitled thereto could not maintain the action.[6] The rendition of a judgment is not the "accruing" of a cause of action within the meaning of the statute.[7] As between a deceased debtor and the creditor thereof, the statute does not run against their claims, after they have been presented to and allowed by the administrator.[8]

Sec. 14. Limitation when cause of action accrued out of State.—Chancellor Kent says that the period sufficient to constitute a

fairly admit of such interpretation, the court is not at liberty to substitute its views of right for the positive action of the law-making power. Swickard *v.* Bailey, 3 Kan. 507, 511.

Where courts have denied to the legislature the power to revive a right of action by repeal of the statute constituting a bar, it will be found that there were constitutional provisions prohibiting such action by the legislature. Swickard *v.* Bailey, 3 Kan. 507, 512. See cases cited by counsel.

[1] Swickard *v.* Bailey, 3 Kan. 507, 511; Parish *v.* Eager, 15 Wis. 532; Bagg's Appeal, 43 Pa. St. 512.

[2] Shuman *v.* Drayton, 14 O. C. C. 328.

[3] Morton *v.* Sharkey, McCahon (Kan.) 113; Bowman *v.* Cockrill, 6 Kan. 338.

Under the act, S. & C. 1140, requiring compensation for causing death by wrongful act, neglect, or default, which gave a right of action *provided* such action should be commenced two years after the death of such deceased person, the proviso is a *condition* qualifying the right of action, and not a mere limitation on the remedy.

The amendment and repeal of the section containing the proviso, during the existence of the right of action, and the omission of the proviso in the section as amended, did not have the effect of extending the time within which the action should have been brought. The Pittsburg, &c., Ry. Co. *v.* Hine, 25 O. S. 629, 634.

[4] Schiml *v.* Schiml, 4 O. C. C. 40.

[5] Angell on Lim., sec. 45.

[6] Leasure *v.* Mahoning, 8 Watts 551; Taylor *v.* Thorn, 29 O. S. 574, and numerous authorities cited.

[7] Schiml *v.* Schiml, 4 O. C. C. 38.

[8] Taylor *v.* Thorn, 29 O. S. 564.

bar to the litigation of stale demands is a question of municipal policy and regulation, and which belongs to the discretion of every government, consulting its own interest and convenience. Though the foreign statute of limitation may have closed upon the demand before the removal of the party to the new jurisdiction, yet it will be unavailing. The statute of limitation in the State in whose courts a suit prosecuted, must prevail in all actions.[1]

This doctrine is based upon the theory that the statutes of limitation affect the remedy, and is the general rule of law in the absence of legislation to the contrary. In Ohio there is a statute providing that, if by the laws of the State or country where the cause of action arose, the action is barred, it is also barred in this State.[2]

Sec. 15. Debtor who has enjoined enforcement of claim cannot interpose plea.—While it is true that the defense of the statute of limitation is looked upon with favor according to the present view, still cases may arise where it would be an unconscionable defense, and the court will not in such instances permit it to be interposed. For example, suppose that a person should by his own procurement prevent a creditor or claimant from taking the proper legal steps for the enforcement of his right until the limitation of the statute has run against the claim or debt of the creditor. This may occur where the debtor has obtained

[1] 2 Kent's Com. 463.

[2] R. S., sec. 4990.

If by the laws of the State or country where the cause of action arose, the action is barred, it is also barred in this State.

Old statutes: See Ingraham *v.* Hart, 11 Ohio, 255.

If the act began to run in Maryland it continues to run in Ohio. State *v.* Shipley, 7 Ohio (pt. 1), 246. See also Horton *v.* Horner, 14 Ohio, 437, 444, s. c. 16 Ohio, 145.

The law of limitation in another State as to a cause of action that accrued there, is the law in this State in reference to that cause. Ingraham *v.* Hart, 11 Ohio, 255. See 22 Bull. 63. Claims barred in other States since 1830, are barred in Ohio. Gordon *v.* Preston, W. 341 (1833).

This section does not apply if a party leaves a State where the cause of action arose and comes into this State before the right of action accrues. 7 Ohio (pt. 1) 229.

Statutes of other States.—If the action is barred in another State it is barred in this State. Gibbons *v.* Ewell, 1 Handy, 561, 562.

The disability as to absent debtors, in statutes of limitation, applies as well to those who resided in the State where the contract was made, and have afterward removed, as to those who have never resided in the State. *Id.*

The limitation of other States govern in some cases, but not to the extent of extending those prescribed by the code. Hoggett *v.* Emerson, 8 Kan. 262.

Foreign Judgment.—Several revivors without notice to the defendant, who was a *bona fide* resident of Kansas and the Kansas statute limitation of five years barred claim on the judgment. Kay *v.* Walter, 28 Kan. 111

Actions upon causes of action accruing out of the State, and not limited by the law of the place where they accrued, or limited thereby to longer periods than those specified in our statute, are governed as to limitation by the Ohio statute in like manner as causes of action accruing within the State. Pinney *v.* Cummings, 26 O. S. 46.

an injunction against the creditor restraining him from enforcing his right, the injunction having been kept in force until the statute of limitation has run. After the injunction has been dissolved and the creditor proceeds by due course of law to enforce his claim, it certainly would be against the conscience of the debtor to interpose the plea of the statute which would not have run against the plaintiff but for his own procurement. A court of equity may, when applied to, interpose the same instrument to prevent such injustice as the party himself has used to obtain an unfair advantage against his opponent, and hence the law does not permit the debtor under such circumstances to interpose the plea of the statute.[1]

Sec. 16. Exceptions — Continuing and subsisting trust. — A "continuing and subsisting trust" is excepted from the operation of the statutes of limitation.[2] Judicial opinion is rather conservative and retains the same rule prevailing before the provision was adopted, that it is only those technical, continuing and subsisting trusts which are within the proper, peculiar and exclusive jurisdiction of courts of equity, that are exempt from the operation of the statutes of limitation.[3] The rule that a technical trust is not barred by lapse of time is subject to several important qualifications, one of which arises where circumstances exist calculated to raise a presumption, from lapse of time, of discharge or extinguishment of the trust.[4]

Trusts other than the so called technical ones, such as actions at law might be founded upon are subject to the operation of

[1] Treasurer *v.* Martin, 50 O. S. 197. It is said by Mr. Justice Story, 2 Story's Eq. Jur. 849: "If a party should apply to a court of equity and carry on an unfounded litigation protracted under circumstances and for a length of time which would deprive his adversary of his right to proceed at law on account of the statute of limitations having in the intermediate time run against it, courts of equity would themselves supply and administer within their own jurisdiction a substitute for that original legal right of which the party had been thus deprived, and by their decree give him the fullest benefit of it." To like effect are, Little *v.* Price, 1 Md. Ch. 182; Moore *v.* Crockett, 10 Humph. 365; Sugg *v.* Thrasher, 30 Miss. 135; Wilkinson *v.* Flowers, 37 Miss. 579; Smith *v.* Scherck, 60 Miss. 493; 13 Am. & Eng. Ency. of Law. 719.

[2] R. S., sec. 4974.

[3] Webster *v.* Bible Soc., 50 O. S. 1, 9; Paschall *v.* Hinderer, 28 O. S. 568; Yearly *v.* Long, 40 O. S. 27; Douglas *v.* Corry, 46 O. S. 349; Kane *v.* Bloodgood, 7 John Ch. 110; Fleming *v.* Culbert, 46 Pa. St. 498.

[4] Phillips *v.* State, 5 O. S. 122. The doctrine that a technical or direct trust is not barred by lapse of time is subject to the following qualification: That this rule in equity is dispensed with, except in cases of fraud or concealment, first where there is a remedy by action at law to which a limitation is expressly fixed; *second*, where an open denial or repudiation of the trust is brought home to the knowledge of the parties in interest, which requires them to act upon an asserted adverse title; and *third*, where there are circumstances calculated to raise the presumption from lapse of time, of a discharge or extinguishment of the trust. Phillips *v.* State, 5 O. S. 122, 124.

the limitation statutes.[1] And where there is concurrent jurisdiction in courts of equity and law for breaches of trust, the equitable suit is barred in the same length of time as the action at law.[2] With the foregoing rule as a guide, it has been adjudged that the following instances are not within the exceptions to the statutes.

An action to recover the amount of a general pecuniary legacy with respect to which the executor is not charged with any duty except to pay it out of the assets when due;[3] nor an obligation of a partner to account with his co-partner after the dissolution, where there has been no fraudulent application or investment of the partnership property, nor agreement making him the liquidating partner, or otherwise giving him possession or control of the partnership assets;[4] nor where a testator devised her real estate to a son with a condition that the son pay the testator's daughters a legacy in annual installments;[5] nor the receipt of money by an attorney which it is his duty to pay over to his client,[6] nor does the statute run against a *cestui que trust* until he has knowledge, or may fairly be presumed to have knowledge of the existence of the trust;[7] nor does it run against the State,[8] even where the State is not a party to the record, but is the real party in interest;[9] nor in favor of the trustee who sells the trust estate or proceedings in partition and buys it himself;[10] nor an action brought under the statute to recover an unpaid balance remaining in the hands of an administrator.[11] The provision of the code in excepting from the operation of the statutes of limitation continuing and subsisting trusts is merely engrafting into the code the equitable rule. The word "trust" is frequently used in a very comprehensive sense; and to hold that the statute is not applicable to any case which may be, even with propriety, denominated a trust, in a great measure would defeat the plain and manifest intention of the legislature.[12]

Sec. 17. Exceptions—Vendee of real property.—The statutes of limitation do not apply to an action by a vendee of real property, in possession thereof, to obtain a conveyance of it.[13] An action by a vendee of real property in possession thereof, to correct a mistake in the conveyance under which such vendee entered into possession and under which he claims title, is not

[1] Webster *v.* Bible Society, 50 O. S. 1; Carpenter *v.* Canal Co., 35 O. S. 317.

[2] Paschall *v.* Hinderer, 28 O. S. 577; 7 Johns. Ch. 90.

[3] Webster *v.* Bible Soc., 50 O. S. 1.

[4] Gray *v.* Kerr, 46 O. S. 652.

[5] Yearly *v.* Long, 40 O. S. 27.

[6] Douglas *v.* Corry, 46 O. S. 349.

[7] Carlisle *v.* Foster, 10 O. S. 198.

[8] Trustees *v.* Campbell, 16 O. S. 11, new case.

[9] Wasteney *v.* Schott, 58 O. S. 410.

[10] Williams *v.* Van Tuyl, 2 O. S. 336.

[11] Lease *v.* Downey, 5 O. C. C. 480.

[12] Douglas *v.* Corry, 46 O. S. 349; Finney *v.* Cochran, 1 W. & S. 118.

[13] R. S. sec. 4974; Howard *v.* Howard, 29 S. W. 285 (Ky.).

barred by the statutes of limitations, as such suit by analogy comes within the above exception of the statute.[1]

Sec. 18. Exceptions—Operation against governmental agencies.—The doctrine is well settled that in the absence of a statute to the contrary, no *laches* are to be imputed to the State or Government, and against it no time runs so as to bar its rights by the statutes of limitation, unless it is merely a nominal party.[2]

[1] Poag *v.* Shaw, 10 O. C. C. 448.

[2] "No laches is to be imputed to the Government, and against it no time runs to bar its rights." Stoughton *v.* Baker, 4 Mass. 522, 528; U. S. *v.* Hoar, 2 Mason (U. S.) 311, 314; U. S. *v.* Thompson, 98 U. S. 486. A State statute cannot bar the United States. U. S. *v.* Thompson, 98 U. S. 486; Trustees *v.* Campbell, 16 O. S. 11; Seely *v.* Thomas, 31 O. S. 301, 308.

"There is no better settled rule than this, that the bar of the statute of limitations cannot defeat a claim in favor of the state, unless the State is introduced merely as a formal party, and the real remedy sought in its name is but the enforcement of a private right." State *v.* L. S. & M. S. Ry., 1 O. N. P. 292; Booth *v.* U. S., 11 G. & J. 373; U. S. *v.* Insley, 130 U. S. 263; Curtner *v.* U. S., 149 U. S. 662; U. S. *v.* Des Moines, 142 U. S. 510; U. S. *v.* Beebe, 127 U. S. 338. See Wood *v.* Ferguson, 7 O. S. 290.

Where State is nominal party, see Muller *v.* State, 38 Ala. 600; Straws *v.* Com., 1 Duv. (Ky.) 149; Moody *v.* Fleming, 4 Ga. 115.

Where State is not a party to the record. but is the real party in interest. Wasteney *v.* Schott, 58 O. S. 410.

Where the legal title to land remains in the Government, the statute of limitations does not run against one who holds a certificate of survey or of purchase. Duke *v.* Thompson, 16 Ohio, 34.

Statute does not run against State except by statutory provision. See Furlong *v.* State, 58 Miss. 717; Coleman *v.* Peshtigo Co., 47 Wis. 180.

The statute of limitations did not affect claims to land until after the Indian title was extinguished. Lesee &c. *v.* Gotham, 9 Ohio 170 (1839).

A purchaser of school lands of which the State was trustee, got them for a less sum, by mistake, than the terms of the sale required. The right of action on account of the mistake remained with the State, until by act of the legislature, the county auditor was authorized to sue upon it. No statutes of limitation could operate until this latter act—though it would run against the county auditor thereafter. Seeley *v.* Thomas, 31 O. S. 301, 308. Will not run against the State even where State holds a claim as assignee. State *v.* School Dist., 34 Kan. 237.

The statute operates against trustees of a township holding title to lands granted to them by the general Government for school purposes, in an action to recover possession of the premises. Oxford Tp. *v.* Columbia, 38 O. S. 87.

In Bentley *v.* Newlon, 9 O. S. 489, *held*, that Virginia Military District school-lands, held under a lease for ninety-nine years, renewable forever, are subject to the operation of the statute of limitation during the continuance of the leasehold estate, as well as after the same has been merged into an estate in fee under act of Jan. 28, 1828, providing for the sale of said lands, and to authorize the lessees of said lands ot surrender their leases and receive certificates of purchase. Bentley *v.* Newlon, 9 O. S. 489.

Statute may be pleaded against the grantee of the Government. Chicago, &c., Ry. Co. *v.* Allfree, 64 Ia. 500, and so held in an action against the bank of the U. S. of which the Government was a stockholder. U. S. Bank *v.* McKeenzie, 2 Brock. 393.

The maxim *nullum tempus occurrit regi* applies only in favor of the sovereign power of the State. Cincinnati *v.* Church, 8 O. 299. See Williams *v.* Church, 1 O. S. 478, 570; Trustees *v.* Campbell, 16 O. S. 11; School Directors *v.* Georges, 50 Mo. 195.

Municipal corporations and counties are subject to the operation of the statute in the same manner and to the same extent as natural persons. City *v.* Evans, 5 O. S. 594; Cincinnati *v.* Church, 8 Ohio, 298; Williams *v.* Church, 1 O. S. 478; Gaines *v.* Hot Springs Co., 39 Ark. 262.

Sec. 19. Actions for recovery of real property.—An action for the recovery of the title or possession of real property can only be brought within twenty-one years after the cause of such action accrues.[1]

Sec. 20. Same, continued—Adverse possession.—If the statute is allowed to run against one claiming title to real estate against the claims of any and all persons not under any disability whatsoever, it results in creating what is termed title by adverse possession. The occupancy must be adverse ; that is, in denial and opposition to the title of another claimant, or under circumstances which indicate the assertion or color of right or title on the part of the person maintaining it as against another person who is out of possession. An agreement not to sue during the holder's lifetime destroys the adverse character of the posses ion.[2]

The possession must be open, continuous, exclusive, and adverse.[3]

If the defendant ceases to occupy at any time, the calculation must be from the last interruption.[4] Open and notorious possession is not sufficient unless it be adverse.[5] It must not be subordinate or permissive.[6] It need not be continuous in any one person ; it may be in the defendant and those from whom he claims, that is, several successive transferees.[7] If it be legal possession it cannot be adverse ; hence possession of a homestead by a widow and minor heirs set apart cannot be adverse.[8]

And so possession of one holding under a life tenant cannot be adverse to the remainder-man.[9] Any agreement between the one in possession and the owner such as not to sue, destroys its adverse character.[10] If the possession of the occupier be temporarily interrupted by a stranger it has no effect upon the statute.[11] Possession under a contract to purchase does not become adverse to the vendor, while the contract is acted upon, and payment made.[12]

[1] R. S. sec. 4977.
[2] Dietrich *v.* Noel, 42 O. S. 18.
[3] Paine *v.* Skinner, 8 O. 159.
[4] Satchel *v.* Doram, 4 O. S. 542.
[5] Lane *v.* Kennedy, 13 O. S. 42. Mere undisturbed possession not sufficient. *Id.*
[6] Submission of a boundary line to arbitration destroys adverse character. Hunt *v.* Guilford, 4 O. 310, 317.
[7] McNeely *v.* Langan, 22 O. S. 32.
[8] Taylor *v.* Thorn, 29 O. S. 569, 572; Holt *v.* Lamb, 17 O. S. 374; Carpenter *v.* Denoon, 29 O. S. 379.
[9] Carpenter *v.* Denoon, 29 O. S. 379.
[10] Dietrick *v.* Noel, 42 O. S. 88.
[11] Clark *v.* Potter, 32 O. S. 49.
[12] Woods *v.* Dille, 11 Ohio, 455.

The possession of a mortgagor or those claiming under him, continuing in the occupancy of the mortgaged premises, acknowledging the subsistence of the mortgage is not adverse to the right of the mortgagee, and will not ripen into a title superior to the mortgage.[1]

Sec. 21. Specialties and written contracts—Fifteen years.—An action upon a specialty, or an agreement, contract, or promise in writing, must be brought within fifteen years.[2] Before the abolition of private seals, a contract under seal was regarded as a specialty, as distinguished from those denominated simple or parol contracts. While the seal which marked the distinction has been abolished, yet the same instruments which acquired the name of specialties, may still be appropriately so called. The determination of what class of writings come under the clause of the statute under consideration, really involves the substantive law of contract. The only way, however, of determining what instruments come under this section, so far as concerns those denominated specialties, and are governed by its provisions, is by ascertaining what are specialties now. Inasmuch as we have the term "specialty" still in the statute, we must ascertain its meaning under the present state of the law. As to the remainder of the section—"an agreement, contract, or promise in writing"—there is no difficulty.

Private seals were abolished in Ohio April 14, 1884.[3] The distinction between sealed and unsealed instruments has likewise been abolished in many other States. Even before this change was made, although an instrument was not required by law to be sealed; if the maker affixed his signature in front of a scrawl seal, at the end thereof, such instrument was nevertheless a specialty.[4] Debts by specialty, or special contract, are such whereby a sum of money becomes, or is acknowledged to be due by deed or instrument under seal.[5] The term *specialty* in the strict and early sense of the word, was regarded as only applicable to bonds, deeds or other instruments under seal.[6] A mortgage is an instrument whereby a debt or duty is acknowledged to be due or owing to another, and very often an agreement, contract, or promise in writing, is also contained therein. It is therefore clear that a mortgage is a specialty,

[1] Allen *v.* Everly, 24 O. S. 97.

[2] R. S. sec. 4980.

[3] 81 O. L. 198.

[4] Louderman *v.* Judy, 2 O. C. C. 351.

[5] 2 Black Com. 465; Tyler *v.* Winslow, 15 O. S. 364; Kerr *v.* Lydecker, 51 O.S. 252.

[6] Stockwell *v.* Coleman, 10 O. S. 40; Kerr *v.* Lydecker, 51 O.S. 252. "Whenever a man by deed obliges himself to pay money to another, it is a debt by specialty." Marriott *v.* Thompson, Willes, 189.

and governed by this provision.[1] When a note is secured by mortgage, the statute of limitations is the same.[2] A recognizance is a specialty within this section;[3] and so with a bill of lading.[4] It has been held that, strictly speaking, a judgment is a contract, and of that class of contracts called specialties; but the word "contract" is not ordinarily used in a sense that includes judgments, nor is it generally so used by law writers; nor is it so used in the section of the code prescribing the limitations on a specialty.[5] The determination of what constituted a specialty was of more importance under the former practice, as the form of action might hinge on the fact as to whether or not it was a sealed or unsealed instrument—specialty or not—but the importance now is, what instruments come within its provisions. Whether or not a judgment is a specialty has elicited some discussion. Mr. Bishop, in his work on contracts, says: "The meaning of the word (specialty) is of late sometimes extended to include judgments; but there is no exigency in the language requiring it, and the correctness of the extended meaning has well been denied."[6] Although judgments in a remote and erudite sense are specialties, they are not embraced in the usual and ordinary sense of the term.[7] A judgment of a court of this State, it is well settled, is not considered as a specialty within the meaning of the statutes of limitation.[8] And it is equally well settled in this State that a judgment rendered by the courts of a sister State is to be regarded as a specialty under the statutes. The decision establishing this rule has never been overruled, and the legislature of the State has acquiesced in that construction.[9] By this statute all contracts in writing are classed together with specialties and subjected to the same limitation. It was not intended to enlarge the word "specialty," but to extend to all written instruments the same limitation.

[1] Kerr *v.* Lydecker, 51 O. S. 240, 253. The bar of the note or other instrument secured by mortgage does not necessarily bar an action on the mortgage. Fisher *v.* Mossman, 11 O. S. 42. The question is not decided in Bailey *v.* Smith, 14 O. S. 396, 411—though often cited in support of the contention that an action for foreclosure is not barred for twenty-one years. See Longworth *v.* Taylor, 2 C. S. C. R. 39, in which there is an error.

[2] Kerr *v.* Lydecker, *supra.*

[3] Bobo *v.* Norton, 10 O. S. 514.

[4] Waring *v.* R. R. Co., 3 W. L. B. 893.

[5] Burnes *v.* Simpson, 9 Kan. 658.

[6] Bishop's Cont., sec. 104, citing Seymour *v.* Street, 5 Neb. 85; Kimball *v.* Whitney, 15 Ind. 280.

[7] Tyler *v.* Winslow, 15 O. S. 366. It has been used in the legislation of other States as a contract under seal, and this was so in Ohio in earlier legislation. *Id.*

[8] Tyler *v.* Winslow, 15 O. S. 364, 368. The word "specialty" has no technical meaning that necessarily embraces judgments. This is the view held by the bar of the State for more than thirty years. *Id.* Todd *v.* Crumb, 5 McLean, 172.

[9] Stockwell *v.* Coleman, 10 O. S. 33; Fries *v.* Mack, 33 O. S. 58; Hawkins *v.* Lasley, 40 O. S. 37, 40.

Deeds, indentures, covenants, bonds, writings obligatory, subscriptions for stock,[1] bills and notes fall within this provision. Indorsements on promissory notes are necessarily included also.[2] An agreement under seal by one person with another to pay a third person can be enforced by such person in his own name within fifteen years, even though this name does not appear therein.[3]

SEC. 22. **Contracts not in writing—Six years.**—An action upon a contract not in writing, either express or implied, must be brought within six years after the cause of action accrues.[4] Under this provision come accounts;[5] the right of a surety to recover contribution against one liable to contribute;[6] or to recover the amount paid by him from his principal;[7] or an action for money had and received;[8] or an action to recover unpaid installments of a legacy;[9] or an action by a county for damages against a railroad company for injuring a bridge;[10] or a suit to recover a deposit in a bank;[11] or a breach of contract to marry;[12] or a claim against a county which has been rejected

[1] Warner *v.* Callender, 20 O. S. 190.

[2] Haines *v.* Tharp, 15 O. 130. An indorsement is in fact a bill of exchange. An indorsement is a written contract of which the law declares the effect; and when counted upon, it is the foundation of the action. *Id.* A note though secured by mortgage is nevertheless a simple contract; the fact that it was recognized by the deed does not change its character. Longworth *v.* Taylor, 2 C. S. C. R. 39; Jackson *v.* Sackett, 7 Wend. 94.

[3] Emmitt *v.* Brophy, 42 O. S. 82 and cases. "A person not named in a written contract, but who is one of the beneficiaries of a promise therein, . . . is not barred of an action on such promise for fifteen years." *Id.*

[4] R. S., sec. 4981.

[5] In some States there is a special statute prescribing that the statute shall run from the date of the last item. But in Ohio there is no such statute. Accounts are not mentioned in the Ohio statute, though it is in other States; they are considered as coming within the limitation annexed to unwritten contracts A right of action accrues on each item of account at the time of its proper date; therefore the statute begins to run against it, and an action will be barred thereon in six years, unless it is taken out of the statute on some special ground. Each item of an account to which the statute is applicable, is barred within six years after the right of action has accrued thereon, unless there be a payment of the account or an acknowledgment of the liability, or a promise to pay the same in writing, signed by the party to be charged. Courson *v* Courson, 19 O. S. 454. Where there is a balance struck, there is a new cause of action, and the statute runs from that time. Agan *v.* File, 32 N.Y. Supp. 1066. When it becomes an account stated the statute begins to run from the time it becomes an account stated, whether anything is paid on it or not. Estes *v.* H. B. Shoe Co., 54 Mo. App. 543. A credit upon an account after it is barred will not be treated as a part payment unless shown to have been so intended. Kaufman *v.* Broughton, 31 O. S. 424.

[6] Neilson *v.* Fry, 16 O. S. 552. Costs cannot be recovered unless notice was given before suing.

[7] Williams *v.* Williams, 5 O. 444.

[8] Mount *v.* Lakeman, 21 O. S. 643; Board *v* Van Slyck, 52 Kan. 622.

[9] Yearly *v.* Long, 40 O. S. 27.

[10] Perry Co. *v.* R. R. Co., 43 O.S. 451.

[11] Locke *v.* Bank, 65 N. H. 670. The statute runs from demand. Leather Mfg. Bank *v.* Bank, 128 U.S. 26; Mitchell *v.* Beckman, 64 Cal. 117. Demand not necessary in case of suspension. Branch *v.* Dawson, 33 Minn. 399.

[12] Chamness *v.* Cox, 30 N.E. 901 (Ind.).

by the commissioners ;[1] or an action upon an over-check for the amount thereof.[2] Where a trustee has a claim against a beneficiary, conveyed the legal title to the latter and at the same time took from a third person a check in payment for such services, which check was not paid, it was held that there was no vendor's lien in favor of the late trustee, and that an action to enforce his claim was limited to six years.[3]

Sec. 23. Statutory liability—Six years.—An action upon a liability created by statute other than by forfeiture or penalty, must be brought within six years after the same accrues.[4] This will embrace the statutory liability of stockholders in a private corporation. There may be an element of an implied contract in the liability of the stockholder: it is true that it may be said that the stockholder impliedly assumes statutory burdens previously imposed; nevertheless it is classed as a "statutory liability."[5] This section will also embrace an action against a railroad company for killing or injuring stock by reason of neglect to fence their road ;[6] but does not apply to an action against a railroad company for injury caused by negligence ;[7] nor where a railroad company wrongfully lays its tracks in the public highway;[8] nor to an action under the statute by a county treasurer to recover taxes and assessments;[9] the terms "forfeiture" and "penalty" used in this section, though generally regarded as synonymous, are not such in this provision. The statute was prepared with care and skill, and repetitions are avoided. The terms are used in contrast, and effect must be given if possible to each. A penalty, in its original legal sense, means a penal punishment. A forfeiture is more comprehensive in its signification, yet it generally accrues to individuals, and may be so limited in the statute requiring strict construction. By the employment of the terms in this statute, penalties and forfeitures are excluded. Whereas, if either alone had been used, the clause would have been open to the construction that would let in the other. Thus restricted it is of rare application.[10]

[1] Honea *v.* Monroe Co., 15 So. 789 (Miss.).

[2] Platt *v.* Black, 10 O. C. C. 499. "And it does not import a loan from the bank to the drawer; but if it appears that the check was paid without funds, an implied promise is raised that the drawer will refund the amount of to the bank." Daniels Neg. Inst. 1566, 1569, 1647.

[3] O'Connor *v.* Smith, 40 O. S. 214.

[4] R. S., sec. 4981.

[5] Hopkins *v.* Furnace Co., 40 O. S. 507.

[6] Seymour *v.* R. R. Co., 44 O. S. 12. See also Bronson *v.* Schneider, 49 O. S. 438. Also an action under the statute providing for garnishment after judgment. Becker *v.* Hulme, 53 Kan. 574, under R. S. Kan., sec. 4585. See Ohio R. S., sec. 5465.

[7] R. R. Co. *v.* King, 31 Kan. 709.

[8] R. R. Co. *v.* Commissioners, 35 O. S. 1.

[9] Hartman *v.* Hunter, 8 O. C. C. 623.

[10] Hopkins *v.* Furnace Co., 40 O. S. 507.

Sec. 24. Action for fraud—Four years.—An action for relief on the ground of fraud is limited to four years, with the further limitation that the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud.[1] Within this section falls an action to cancel a note for fraud;[2] to impeach a settlement by a corporation with its creditors for fraud;[3] or where an executor fraudulently parts with the assets of the estate;[4] or an action to set aside a fraudulent conveyance;[5] an action for specific performance against the heirs of the vendor, and against his grantee who took the legal estate with notice, is not an action for relief on the ground of fraud within the meaning of the code, and the grantee cannot protect himself by the limitation therein.[6] In *City v. Myers, as assignee*,[7] an action was brought to impose a trust upon the entire assets of one who wrongfully or fraudulently[8] converted public funds. The plaintiff having attempted to follow the trust funds, instead of pursuing its claim as a general creditor upon an implied contract,[9] his action would be limited by the statutory period for limitations of actions on account of fraud. The provision that "the cause of action in such case shall not be deemed to have accrued until the discovery of the fraud" applies to actions *for damages* founded upon fraud, as well as to actions for *equitable relief* founded upon fraud.[10]

Sec. 25. Same, continued—Discovery of fraud.—The important question in connection with this provision relates to the discovery of the fraud, and the consequent running of the statute. It is a general rule that want of knowledge does not prevent the running of the statute of limitation against an action that has accrued in his favor. The only exception to that rule is that prescribed in this section, where there is concealment or fraud.[11] Independently of statute, courts of equity have relieved against statutes of limitation, as where a person has perpetrated a fraud, which is not discovered until the statute of limitation had run against the right of action.[12] The statute cannot run against an infant for the wrong of its guardian *ad litem* until the discovery thereof by the infant;[13] nor against *a cestui que trust* until he has knowledge of the trust; or may fairly be presumed to have knowledge thereof;[14] nor against an action to reform an instru-

[1] R. S., sec. 4982.
[2] Loffland *v.* Bush, 26 O. S. 559.
[3] Railroad Co. *v.* Smith, 48 O. S. 219.
[4] Bank *v.* McIntire, 40 O. S. 529.
[5] Combs *v.* Watson, 32 O. S. 228, 234.
[6] Mosher *v.* Butler, 31 O. S. 188.
[7] 52 Kan. 363.
[8] See R. S., sec. 4982.
[9] R. S., sec. 4981.
[10] Young *v.* Whittenhall, 15 Kan. 579.
[11] State, *ex rel*, *v.* Standard Oil Co., 49 O. S. 188.
[12] Angell Lim., sec. 30 (6th Ed.).
[13] Long *v.* Mulford, 17 O. S. 484.
[14] Carlisle *v.* Foster, 10 O. S. 198.

ment on the ground of mistake, where in analogy to the statute of limitations, the lapse of time is applied by courts of equity, and is reckoned therefore from the discovery of the mistake.[1] It is immaterial when the cause of action accrued, as it is not deemed to have accrued for the purpose of applying the limitation of the statute until the discovery of the fraud. A discovery of the fraud merely informs the party of an existing cause of action, and enables him to enforce it, and the statute secures a party from the running of the statute as a limitation against an action that has already accrued and is existing.[2] It must be actual knowledge and not mere suspicion that will set the statute running.[3] Knowledge on the part of the guilty officers and agents of a corporation of the fraudulent acts and conduct of themselves and guilty associates, is not notice to the corporation and its stockholders, so as to give the advantage of such notice to such agents and associates.[4] The rule that in cases of fraud the statute begins to run only from the discovery of the fraud, does not apply where the party injured might with ordinary diligence discover the fraud. But where the parties occupy with reference to each other a relation of trust or confidence, making it the duty of the wrong-doer to disclose the true state of affairs, and the defrauded party relies upon his representations, the failure to use due diligence will not be allowed to operate against him.[5] The date of discovering the fraud being an essential to the cause of the action therefor, where it is apparent, therefore, upon the face of the pleading that the fraud was committed more than four years before the action is commenced, an averment must be made to the effect that it was not discovered until within four years before the suit was begun.[6]

Sec. 26. Action for recovery of or taking personal property—Four years.—The action for recovery of personal property or for taking, detaining, or injuring the same is barred within four years from the time the cause of action accrued. But for the

[1] Ormsby *v.* Longworth, 11 O. S. 653. Where the vendee of a tract of land undertook, not only for himself, but as the agent of the vendor, to survey the tract of land, and through mistake included more than he was entitled to, and prior to the lapse of twenty-one years discovered the mistake but concealed it from the heirs of the vendor, it was held such a fraud as would prevent a court of equity from giving him the benefit of any lapse of time which occurred prior to the discovery of the fraud. Longworth *v.* Hunt, 11 O. S. 194.

[2] Combs *v.* Watson, 32 O. S. 234; Gates *v.* Andrews, 37 N. Y. 657.

[3] Marbourg *v.* McCormick, 23 Kan. 38.

[4] Ryan *v.* Ry. Co., 21 Kan. 365.

[5] Vigus *v.* O'Bannon, 8 N. E. Rep. (Ill.) 778.

[6] Kinkead's Code Pleading, sec. 605; Myers *v.* Center, 47 Kan. 324; Combs *v.* Watson, 32 O. S. 228.

wrongful taking of personal property, the cause of action is not deemed accrued until the wrong-doer is discovered.[1] The action generally brought, to which this action applies, is replevin. An action in tort for the recovery of damages for injury to personal property is another illustration; and though the action for damages allege the feloniously taking of personal property by force, even though there is a charge that the same was fraudulently concealed, it comes under this provision rather than under the clause "for relief on the ground of fraud."[2] The action known in present practice as conversion also comes within this provision. The actions falling under this section should sound in tort rather than upon contract, and wherever the property is taken without the plaintiff's consent, the four-year limitation rather than the six-year clause, applies.[3] Where a party claims to hold for another as trustee of personal property, under a mere constructive and not an express trust, of which he had notice, he must assert the claim within four years from the time when the trust is alleged to have originated in analogy to the statute limiting actions for the detaining of personal property.[4] The time when the cause of action accrues under this clause is settled by the usual rules governing cases where property comes into the hands of the defendant lawfully or unlawfully. If the goods came into the hands of the defendant lawfully, the action cannot be maintained until there is a demand and a refusal, and hence the cause of action accrues from that date. Where the original taking was unlawful, necessarily the statute begins to run from the date of such original taking. Be the action for the recovery of the specific property, or for damage for their taking, there should be a demand for the property, and for a reparation for their wrongful taking.

Sec. 27. Injury to rights not arising on contract, not otherwise enumerated—Four years.—An action for an injury to the rights of the plaintiff not arising on contract and not hereinafter enumerated must be commenced within four years after the accrual thereof.[5] An action at law by a mortgagee for an injury to the mortgage security is governed by the four-year limitation. When the action is founded upon tort, the statute runs from the injury; if based upon fraud, then from the discovery of the fraud.[6] In a Kansas case, in an action against a railroad company for injury to the plaintiff by reason of negligence of the

[1] R. S., sec. 4982.
[2] Howk *v.* Minnick, 19 O. S. 462.
[3] Davidson *v.* Hall, 1 Clev. 363.
[4] Raymond *v.* Moore, 1 C. S. C. R. 456.
[5] R. S., sec. 4982.
[6] Carpenter *v.* Canal Co., 35 O. S. 317; Cameron *v.* Cincinnati, 17 W. L. B. 153 (Ham. Co. Com. Pl.).

company's agents, the plaintiff contended that the period of limitation prescribed for "an action upon a liability created by statute"[1] should control, while the railroad company contended that the limitation for "an action for injury to the rights of plaintiff not arising on contract"[2] was alone applicable, arguing that the latter subdivision "defines a class of injuries, and carves such class out of the general rule given in the preceding subdivision." In this view, the company was sustained by the supreme court.[3] In Ohio, it is held that an action for damages for death by wrongful act, being founded *ex delicto*, is barred in four years from the time that the action accrued. The decision was upon the foundation of the action is the injury, not the death alone, and the cause of action accrues at the time the injury was received.[4]

Sec. 28. Trespass upon real property—Four years.—An action for trespass upon real property is limited to four years. But in an action for trespass under ground, or injury to mines, the action shall not be deemed to have accrued until the wrongdoer is discovered.[5] The person maintaining the action must be in possession of the premises, either actual or constructive.[6] This will embrace an action for the recovery for a temporary injury resulting from a change of grade by a railroad company.[7] But when a man commits an act of trespass upon another's land, and thereby injuries such other at once, and to the full extent that such an act will ever injure him, he is liable at once for this one act and all its effects; and the statute runs from the time of such act.[8] Where, however, the trespass is of a continuous nature, the trespasser becomes liable for the additional damages done, and will continue liable, until, by adverse use or possession, the trespasser has enforced an adverse claim that has ripened, and has become a presumptive right, and the person suffering from the trespass may maintain the action; the four-year statute of limitation will not bar a recov-

[1] R. S. Ohio, sec. 3981; R. S. Kan. (1889), sec. 4095, sec. 18, subd. 2; 6 years in Ohio, 3 in Kan.

[2] R. S. Ohio, sec. 4982; R. S. Kan. (1889), sec. 4095, sec. 18, subd. 2; 4 years in Ohio, 2 in Kan.

[3] A. T. & S. F. R. R. Co. *v.* King, 31 Kan. 709 (the latter clause qualifies and limits the former).

[4] Alston Admr. *v.* C. C. C. & I. R. R. Co., 2 O. O. C. 45. The contrary is held in the Circuit Court of the U. S. holding that the statute begins to run at the time of death, although that takes place after the injury sometimes. Nostelle *v.* Northern Pac. R. Co., 56 Fed. 261.

[5] R. S., sec. 4982. This was not so prior to statute of 1884; Williams *v.* Coal Co., 37 O. S. 583.

[6] Rowland *v.* Rowland, 8 O. 40.

[7] Railroad Co. *v.* Hambelton, 40 O. S. 496. If it be a suit for a permanent injury, then the limitation would be twenty-one years. *Id.*

[8] Valley Ry. Co. *v.* Franz, 43 O. S. 626.

ery in such case.[1] The bar to the recovery in an action of trespass includes all the consequences resulting from such trespass.[2]

Sec. 29. The one-year clause.—What may be termed the one-year clause limits to one year actions for libel, slander,[3] assault, battery, malicious prosecution, false imprisonment or malpractice, or an action upon a statute for a penalty or forfeiture.[4] The statute of limitations will commence to run from the time the alleged slanderous words were spoken, and not from the time the plaintiff first had knowledge of the fact that they had been spoken.[5]

Sec. 30. Action on official or other bonds.—An action upon the official bond or undertaking of an officer,[6] assignee, trustee,

[1] Valley Ry. Co. *v.* Franz, 43 O. S. 623. Where the act of trespass is a permanent one, as the erection of buttresses to support a turnpike road, as in Holmes *v.* Wilson, 10 Ad. & El. 503, or the erection and maintainance of a permanent building, as in Thompson *v.* Gibson, 7 M. & W. 456, it may be said to be a continuing trespass for which a cause of action accrues. *Id.*

[2] Williams *v.* Coal Co., 37 O. S. 583.

[3] The statute begins to run from the date of the publication, unless the party is under disability. Odgers L. & S. 521. The time begins to run from the time the damages have been actually sustained in cases where the words are actionable because they have caused special damages; there can be no cause of action accrue until the damage is done. 13 Am. & Eng. Enc. of Law, p. 454.

[4] R.S., sec. 4983. The action authorized by the act for the prevention of gaming, March 12, 1831, 1 S. & C. 664, to recover money or other property lost or paid over on a bet or wager, is an action upon a statute for a penalty or forfeiture within the meaning of the code. Cooper *v.* Rowley, 29 O. S. 547 (1876). It is held in Kansas that an action to recover a penalty for failing to discharge of record a mortgage cannot be maintained until the demand for the discharge has been made, and it can only be brought within one year (the period in that State) after the cause of action accrues; but where no demand is made until more than one year after the demand could have been maintained, the action to recover the penalty is barred by the statute. Wey *v.* Schofield, 53 Kan. 248; Hall *v.* Hurd, 40 Kan. 374.

[5] 3 Pearl *v.* Kock, 32 W. L. B. 52.

[6] But an action against an officer not on his official bond must be brought within six years. Mount *v.* Lakeman, 21 O. S. 643. In State *v.* Kelly, 32 O. S. 421, 430, which was an action on a county treasurer's bond, for having unlawfully received certain allowances, it was held that the provision for limiting actions upon penalties or forfeitures, R. S., sec. 4983, was not applicable to the case, it being one provided for under the statute, S. & S. 919, sec. 2 (4), which reads that the offending officer "shall be liable in an action on his bond," and the ten-year limit was, therefore, applicable. R. S., sec. 4984.

Where there is an action for a penalty given against an officer, which is barred in a certain time, no action on his bond can be maintained after the statutory bar. A bond given by a public officer is only a collateral security for the faithful performance of the official duties of the officer, and the collateral obligation can exist no longer than the liability it was created to insure. State *v.* Blake, 2 O. S. 147; State *v.* Newman, *Id.* 567; Bank *v.* Conway, 18 Ohio, 234; Mount *v.* Lakeman, 21 O. S. 643. "The statute providing for the five-year (ten-year in this State) limitation is not that a cause of action on a bond shall not be barred until five years have elapsed, but it is that the action can only be brought within five years after the cause of action shall have accrued." Board *v.* Van Slyck, 52 Kan. 622, 628.

executor, administrator or guardian,[1] or upon a bond or undertaking given in pursuance of a statute, can only be brought within ten years after the cause of action accrues, but this section is subject to the qualification that where a different limitation is prescribed by statute, that shall govern.[2]

Sec. 31. Ten years—Other relief.—An action for relief not otherwise specially provided for can only be brought within ten years after the cause of action accrues.[3] This section applies to an action under the statute,[4] to make the individual members of a partnership, who have been sued by their firm name, parties to a judgment obtained against the firm;[5] or to an action by one partner against his co-partner for an accounting;[6] or to an action upon an agreement with a mother of an adopted child to provide for it.[7] An action to reform a written instrument on the ground of mistake also comes within this clause of the statute; and it may be set up as a bar, as well, when such reformation is set up in an answer as in an action brought to enforce the instrument. In such case the cause of action accrues upon the execution of the instrument, and not upon discovering the mistake.[8] But this limitation is not applicable to an action brought on a judgment rendered in another State or Territory;[9] nor to an action for money had and received for

County clerk failing to account for fees and wrongfully retaining same,—Board *v.* Van Slyck, 52 Kan. 622. An action founded on such is for statutory liability, and should not be on official bond. *Id.*

Ten years—Action against sheriff—When time begins to run demand must be made.—A cause of action against a sheriff, for not paying money collected by him on execution, does not accrue until demand is made on him for payment, and the statute begins to run from the time of the demand (State *v.* Newman, 2 O. S. 567; King *v.* Nichols 16 O. S. 80). Such demand, however, must be made in a reasonable time, and, if no cause for delay is shown, should be made at least within the time limited by the statute for bringing the action; and in the absence of special circumstances, if no demand be shown within that time, it will be presumed to have been made at the expiration of that period, so far as regards the statute of limitations. Keithler *v.* Foster, 22 O. S. 27. See Angell on Limitations, sec. 96, on point where statute begins to run from date of demand.

Where a sheriff failed to pay over money collected in his official capacity, he could be sued for the *tort* (limit, one year) or for money had and received (limit, six years), 2 O. S. 567.

[1] The four-year limitation prescribed by the act for the settlement of the estates, in which suits are to be commenced against administrators and executors, applies to an action instituted on a guardian's bond. Favorite *v.* Booher, 17 O. S. 548.

[2] R. S., sec. 4984, 4976.

[3] R. S., sec. 4985.

[4] R. S., sec. 5370.

[5] Hawkins *v.* Lasley, 40 O. S. 37. This suit is not an action on the judgment; it is rather "an action notwithstanding the judgment. It is not an action upon the liability created by statute, other than a forfeiture or penalty." *Id.*

[6] Gray *v.* Kerr, 46 O. S. 652. The statute begins to run from dissolution of partnership. *Id.*

[7] Swan *v.* Shahan, 1 O. C. C. 216.

[8] Bryant *v.* Swetland, 48 O. S. 194, 209.

[9] Fries *v.* Mack, 33 O. S. 52.

money received by a treasurer of a township and converted to his own use;[1] nor to action for contribution.[2]

Sec. 32. Amercement.—Whether or not a proceeding to amerce an officer is within any provision of the statutes of limitation, has not been exactly decided in Ohio. It has been considered indirectly in two cases, but by reason of the peculiar nature of the cases it can hardly be said that the question is decided. It seems apparent that an officer cannot be amerced for any causes other than those enumerated in the statute authorizing amercement. It is said that the proceeding is in itself naturally penal, and therefore strictly construed.[3]

In another case a statement is made that a motion to amerce is not within the statutes of limitation, though in this case it does not appear that the amount of money to be recovered was within the provision of the statute authorizing amercement.[4] The question has been considered in Kansas, where it is held that it falls within the provision of the statutes of limitation, limiting actions upon statutory liability for penalty or forfeiture. This conclusion was, however, reached by a divided court, the judge dissenting regarding amercement as a special proceeding and not as an action.[5] We think that the dissenting judge is right so far as it being a special proceeding. The procedure is entirely by motion, no pleadings being required. It is apparent that from the nature of the proceeding it has no relation to the statutes of limitation, though it may be true that the results of amercement partake of the nature of a statutory penalty. But the trouble is that the special way of recovering the amount is entirely by motion, and not by an independent action. If it is desired to sue a sheriff upon his liability as an officer for failure to perform any of his duties regarding any of the causes mentioned in the amercement statute, an independent action could be brought against the officer upon his bond, and such an action would fall within the ten-year clause governing actions on official bonds;[6] or if it be upon an implied contract which exists between the officer and the public, then it is limited by the six-year clause as upon a contract expressed or implied.[7]

Sec. 33. Bridge companies—Action for injury from.—The statutory provisions prescribing the powers of bridge companies also make them responsible for injuries done to private property, adjacent or near to such bridge, by its elevation and

[1] Mount *v.* Lakeman, 21 O. S. 643.
[2] Neilson *v.* Fry, 16 O. S. 552.
[3] Bushnell *v.* Eaton, Wright 720.
[4] State *v.* Crowell, 1 W. L. J. 305.
[5] Fuller *v.* W. F. Ex. Co., 42 Kan. 551.
[6] *Ante*, sec. 30.
[7] *Ante*, sec. 22.

construction, which may be recovered in a civil action brought by the owner at any time within two years from the completion thereof.[1]

Sec. 34. Contempt—Limitation in.—The power of a probate court to proceed by citation or attachment against an administrator, for neglect to file his settlement accounts is a necessary incident to the powers of the court, but such proceeding is barred by such lapse of time, after the default, as would be sufficient to bar an action on the administration bond.[2]

Sec. 35. Actions for penalties in habeas corpus proceedings.—There are penalties prescribed in statutes regulating habeas corpus proceedings for certain violations. For instance, if a clerk should refuse to issue a writ for allowance thereof and demand therefor, he being liable to the penalty, to the party aggrieved, in the sum of five hundred dollars.[3] So also if a person to whom a writ is directed neglects or refuses to make a return according to the amount thereof, or makes a false return, he should upon demand made by the prisoner, or any person on his behalf, refuse to deliver to the person demanding, within six years after the demand thereof, a true copy of the warrant of commitment and denial of the prisoner, is liable to forfeit for the first offense to the party aggrieved two hundred dollars, and for the second offense four hundred dollars.[4] The party who is aggrieved by reason of these wrongful acts on the part of the officers, in order to recover the penalties so described must proceed by a civil action in any court having cognizance of the same. The limitation prescribed for this action is two years after the offense is committed, except in cases of imprisonment of the party aggrieved, when action may be brought within two years after the action of delivery out of prison, or by his personal representative within two years after his decease if he die in prison.[5]

Sec. 36. Limitation in error proceedings.—This matter has been fully covered in the author's work on Pleading.[6] But to cover the subject fully here this section governing the limitation in error proceedings is given.

The right to prosecute proceedings in error in civil cases is open alike to both parties, but until recently this rule has not been extended to criminal procedure. Heretofore only the accused has had the right to take the case to the higher courts

[1] R. S., sec. 3542.
[2] Phillips *v.* State, 5 O. S. 122.
[3] R. S., sec. 5745.
[4] R. S., sec. 5746.
[5] R. S., sec. 5752.
[6] Kinkead's Code Pleading, sec. 1265.

and have it reversed; and if it should be reversed by the circuit court the State was compelled to rest content with that decision and let the case go back to the trial court for another trial. And so as to matters of error accruing at the trial of the criminal case, the State does not have the privilege of prosecuting error with the same results and in exactly the same manner as does the accused. The State may by its representative except to any decision of the court and present his bill of exceptions thereto, taking it up to the higher courts for review, merely for the purpose of having a rule of law established for the satisfaction of those engaged in that class of procedure, and for future precedent. The judgment of the court in the case in which the bill is taken may not be reversed, nor in any manner affected; but the decision of the supreme court merely determines the law which may cover future cases of like character.[1] This has been the general course of criminal procedure in this State for many years, until a recent enactment by the legislature, in which parties in both criminal and civil procedure are placed upon an equal footing.

The limitation prescribed in civil cases requires that any one desiring to prosecute error to reverse, vacate or modify a judgment or final order, must be commenced within four months after the rendition of the judgment or the making of the final order complained of. If it should so happen that the person entitled to prosecute such proceeding is under some disability, then he has four months after the removal of that disability in which to prosecute error;[2] but it does not begin to run until final judgment is entered.[3] It is now provided that where there has been a conviction of any crime, misdemeanor, or violation of city ordinances in any court inferior to the circuit court, such conviction may be reversed by the circuit court, and that the attorney representing the State may now prosecute proceedings in error in the supreme court to reverse the order of reversal in the circuit court. The proceedings in such case in the supreme court will be exactly similar to those in the hearing of petitions in error in other cases.[4] There does not appear to be any limitation prescribed in this section within what time such a proceeding may be commenced, and it being such an innovation in criminal procedure there is probably no other statute of limitation which may govern the matter.

Sec. 37. Proceedings to revive action.—An order to revive an action against a representative or successor of the defendant,

[1] R. S., secs. 7305, 7306, 7307, 7308.
[2] R. S., sec. 6723; 93 O. L. 394.
[3] Lafferty *v.* Shinn, 38 O. S. 46.
[4] R. S., sec. 7306*a*; 92 O. L. 187.

cannot be made without the consent of the representative or successor; unless within one year from the time that it could have been first made.[1] An order to revive an action in the name of the representative or successor of the plaintiff may be made forthwith, but cannot be made as matter of right without the consent of the defendant, after the expiration of one year from the time the order might have been first made; but when the defendant is dead or his powers have ceased, the order of revivor on both sides may be made in the period limited in R. S., section 5157.[2]

Sec. 38. Proceedings to revive judgment.—An action to revive a judgment can only be brought within twenty-one years from the time it became dormant, unless the party entitled to bring such action was at the time the judgment became dormant within the age of minority, of unsound mind, or in prison, in which case the action may be brought within fifteen years after such disability is removed.[3] Neither non-residence in a county or State, nor absence therefrom, nor coverture are disabilities under this provision which will prevent the statute from running.[4] This provision was attacked upon the ground that it was unconstitutional, being within the inhibition against retroactive laws. But it was held constitutional upon the ground that the limitation does not go to the merits of the action—and the establishment of the contested right—but to the remedy or the enforcement of the right already established.[5] The acts of the legislature having elements of limitation, and capable of being so applied and administered, although the words are broad enough to and do, literally read, strike at the right itself, will be construed to limit and control the remedy; for as such they are valid, but as weapons descriptive of vested rights they are valid, and such force only will be given the acts as the legislature could impart to them.[6] A surety has the right to revive a judgment in his own name, to the extent that the plaintiff could, notwithstanding ten years have elapsed since he paid the judgment; in other words, he has the same right to have the judgment revived as the judgment creditor would have, because upon payment of the judgment he is subrogated to the right of the judgment creditor, and is then in position to take advantage of the section of the statute limiting revivor, especially of dormant judgments, and is not bound by the ten

[1] R. S., sec. 5157.
[2] See Kinkead's Code Pleading, secs. 1107, 1108.
[3] R. S., sec. 5368.
[4] Bartol S. Eckart, 50 O. S. 31.
[5] Bartol S. Eckart, 50 O. S. 31, 43.
[6] Newland *v.* Marsh, 19 Ill. 384.

year section of the statutes of limitation, on the theory that it is for relief not otherwise provided for.[1]

Sec. 39. Damages for change of railroad route—Six months.—When the line of a railroad company is under a statute authorizing it[2] changed to avoid dangerous or difficult curves, or other dangers named, the company shall be liable for any damages caused by such change; but actions for the recovery of such damage cannot be commenced after six months from the filing of the certificate, declaring the change necessary, filed with the secretary of state, and the publication of notice thereof for four consecutive weeks provided by statute. The rights of infants, lunatics, and persons imprisoned are saved after six months after disability is removed.[3]

Sec. 40. Damages for laying track in street—Two years.—An injury which an abutting lot owner sustains from the construction of a railroad track in a street is a trespass, and the statute of limitation would commence to run from the first occupation of the street, if it were not otherwise provided by law.[4] In the absence of a special statute such an injury would fall within the four-year limitation governing a trespass to real property. But there is a special statute providing that for injuries done to private or public property by the construction of a railroad in a street in front thereof, a civil action may be brought by the owner, before the proper court at any time within two years from the completion of the tracks.[5] As this action can only be maintained when the company has procured the right of way either by consent of the owner or by appropriation, the two-year limitation would only apply in such cases.[6] Where the company has not obtained the right of way, the remedy of the owner is by proceeding to compel the company to appropriate the right of way for its road.[7]

Sec. 41. Limitations governing proceedings in Quo Warranto.—An action in Quo Warranto against a corporation to declare a forfeiture of its charter must be commenced within five years after the act complained of has been committed. Nor shall an action be brought against a corporation for the exercise of a

[1] Peters *v.* McWilliams, 36 O. S. 155.

[2] R. S., sec. 3275.

[3] R. S., secs. 3275, 3276.

[4] R. R. Co., *v.* O'Connor, 42 Neb. 90. See Lawrence R. R. Co. *v.* Commissioners, 35 O. S. 1; Omaha & R. V. Co., *v.* Moschel, 56 N. W. 875 (Neb.—).

[5] R. S., sec. 3283. The time within which such suit must be brought is two and not four years. R. R. Co. *v.* Mowatt, 35 O. S. 287.

[6] Lawrence R. R. Co. *v.* Williams, 35 O. S. 168.

[7] Lawrence R. R. Co. *v.* Williams, *supra.*

power or franchise under its charter, which it has used and exercised for a term of twenty years, nor can an action be brought against an officer to oust him from his office, unless it is brought within three years after the cause of such ouster, or the right to hold the office, arose.[1] The limitation prescribed by statute as to this matter applies to the State as well as individuals.[2]

Sec. 42. Action for damages against officers of ousted corporation.—When judgment of forfeiture and ouster is rendered against a corporation because of any misconduct of the officers or directors thereof, a person injured thereby may, at any time within one year thereafter, in an action against such officers or directors, recover the damages he has sustained by reason of such misconduct.[3]

Sec. 43. Recovery of illegal taxes or assessments.—Actions under the statute for recovery back of illegal taxes or assessments which have been collected, must be brought within one year after the same have been collected.[4] When, for the purpose of collection, an assessment is divided into two or more installments, the limitation, as provided in the section, begins to run against such installment from the time of its collection, and not from the collection of the last installment.[5] The fact that an ordinance assessing the costs for the improvement is passed under a mistake in a calculation as to the cost of the improvement does not prevent the statute from running.[6]

Sec. 44. Will—Contest of.—There are two sections of the statutes governing the law of limitation or the prosecution of an action to contest a will, the general import of which is the same. The one section prescribes a limitation of two years after a will has been admitted to probate in which an action to

[1] R. S., sec. 6789. See State *v.* R. R. Co., 50 O. S. 239; State *v.* Standard Oil Co., 49 O. S. 137.

[2] State *ex rel v.* Bingham, 14 O.C.C. 245.

[3] R. S., sec. 6790.

[4] See Groesbeck *v.* Cincinnati, 51 O. S. 365. An ordinance of the city of Cincinnati, making an assessment for grading and paving a street, provided that the owners of lots on which the assessments were made should severally pay the same within twenty days from the date of the ordinance, or be subject to the interest and penalty allowed thereon by law.—*Held*, that an action to enforce the lien of the assessment against a lot, commenced more than six years after the date of the ordinance, but within six years after the expiration of said twenty days, is not barred by the statute of limitations. Reynolds *v.* Green, 27 O. S. 416. An action to enforce the lien of an assessment under the act of April 11th, 1876 (73 O. L. 218), commenced within six years of the passage of the act, if such assessment shall so long continue to be a lien upon the property, is not barred by the statute of limitations. Brenchweh *v.* Drake, 31 O. S. 652 (R. S., sec. 5848).

[5] Pelton *v.* Bemis, 44 O. S. 51.

[6] Groesbeck *v.* Cincinnati, 51 O. S. 365.

contest must be brought, saving to persons within the age of minority, of unsound mind, imprisonment, absence from the State, the usual privileges prescribed in statutes of limitation, allowing them to bring an action within two years after the disability has been removed.[1] The other section found in the probate code provides that no person can, within two years after the probate of the will, appear and contest its validity, but after that period it shall be forever binding, excepting as to those persons under the foregoing disabilities; adding, however, one additional disability, namely, persons in captivity.[2]

There is necessarily by reason of the peculiar nature of the proceedings and the results which follow it, a unity and interest among those persons who are heirs or legatees under the will. Consequently, where a will is set aside at the instance of one who is within the saving clause it is wholly void, and the entire estate is to be distributed by law.[3] And where an action to contest is commenced within the period of limitation, the right of action is saved as to all persons interested and who are not made parties, but who are ultimately joined in the action after the period of limitation has expired. So long as the right of action is saved to any plaintiff, the action brought by him necessarily inures to the advantage of all persons interested with him in the suit; for the will being an entirety is wholly inoperative when set aside at the suit of any party, and the estate must then be divided and distributed under the law.[4] Where a person is under two or more disabilities mentioned in this statute, his right of action is not barred until the expiration of the statutory period, after the longest continuing disability is removed.[5]

Sec. 45. Statute applicable to set-off.—The statutes of limitation, it is well settled, are applicable to a set-off; the general rule being, that, "if a defendant pleads a set-off, the plaintiff may reply the statute."[6] The statute "ceases to run against the set-off from the date of the commencement of the action in which it is pleaded."[7]

Sec. 46. Criminal prosecutions—Limitations on.—It is provided that no one shall be prosecuted for any offense, penalties excepted, the prosecution of which is not specially prohibited by law, unless the indictment be found, or the prosecution com-

[1] R. S., sec. 5866.
[2] R. S., sec. 5933.
[3] Meese *v.* Keefe, 10 Ohio, 362.
[4] Bradford *v.* Andrews, 20 O. S. 222; Powell *v.* Koehler, 52 O. S. 103.
[5] Powell *v.* Koehler, *supra*.
[6] Wood on Limitations, p. 722; Buswell on Limitations, sec. 141; Bryant *v.* Swetland, 48 O. S. 209; McEwing *v.* James, 36 O. S. 152; Irwin *v.* James, 36 O. S. 152.
[7] McEwing *v.* James, 36 O. S. 152.

menced, within three years from the time that the offense was committed.[1] Special limitations are provided as follows: prosecutions under the statute prohibiting betting on elections in various forms to one year;[2] under the section prohibiting a candidate for a nomination by a political party for an office of trust, offering bribes, within six months;[3] or common labor on Sunday, ten days;[4] for corrupting jurors, witnesses, or obstructing justice, within one year;[5] profane swearing, within ten days;[6] or sporting, rioting, quarreling, hunting, fishing or shooting on Sunday, within ten days;[7] and exhibiting theatrical performances on Sunday, within seventy days.[8]

Sec. 47. When statute begins to run—Generally. The time when the statute commences to run is from the time when the cause of action arose or accrues. It begins to run from the moment the remedial right comes into existence, in other words, when the antecedent right is violated.[9] It is not essential that the party in whose favor the action exists should have knowledge of it, except in an action on account of fraud,[10] and possibly mistake. The time commences as soon as the action accrues, and stops from the date of the service of the summons in the action.[11] An attempt to commence an action followed by a service within sixty days is equivalent to the commencement of an action.[12] When an amended petition is filed which does not in effect change the cause of action from that stated in the original petition, the computation of the time ends with the filing of the original.[13] It is very well settled in Ohio that an amendment that materially changes the cause of action, such as adding a cause of action upon which the limitation had run from the date of the filing of the original petition and the amended petition, the amendment does not then have a retroactive operation going back by relation to the original petition. A plaintiff, for example, cannot, by amendment made after the statute has run as to land omitted from the original petition but included in the amended petition, include such omitted land and have the amendment relate back to the filing of the original petition, so as to defeat the plea of the statute, as to lands

[1] R. S., sec. 6805.
[2] R. S., sec. 6939.
[3] R. S., sec. 7044.
[4] R. S., sec. 7033.
[5] R. S., sec. 6907.
[6] Sec. 7031.
[7] R. S., sec. 7032.
[8] R. S., sec. 7032*a*.
[9] Holland's Jur. 295.
[10] Sec. 25.
[11] See 4987 Code; Kinkead's Code Pldg., sec. 7 (2 Ed.).
[12] Code, sec. 4988.
[13] B. & O. Railroad Co. *v.* Gibson, 41 O. S. 145.

brought in by the amendment.[1] When the statute begins to run it continues to run until the claim is barred.[2]

Sec. 48. When statute begins to run, continued—Contract for continuing services.—Where services are performed under a single and entire contract, in the absence of stipulation to the contrary, payment is not due until services are fully performed.[3] If, pending such contract, the party employed dies, the statute does not begin to run until the appointment of an administrator or executor.[4]

Sec. 48½. When statute begins to run—Covenants.—Statutes of limitation begin to run upon a covenant as soon as broken. A covenant of seizen where the grantor is in possession is not broken until eviction; if not in possession, then as soon as made.[5] A covenant against incumbrance is broken as soon as an incumbrance in fact exists.[6] A covenant of warranty is broken when there has been an eviction.[7]

Sec. 49. When statute begins to run—Notes and bills.—The statute begins to run upon a note payable at a definite date, at maturity, which is—excluding the day of maturity—the next succeeding day.[8] If a note is payable upon demand it is due upon delivery—a right of action accrues from its date—and the statute commences to run then.[9] If payable after demand the statute runs from the date of the demand.[10] Upon notes payable after sight or after notice, the statute runs from presentment or notice.[11] Upon notes payable in installments the statute runs upon each installment as it becomes due.[12] But if it so reads that if default be made in any one installment the

[1] Hills *v.* Ludwig, 46 O. S. 373; Pratt *v.* Montcalm C.C., 63 N.W. 506 (Mich.); Taylor *v.* Brown, 27 S.W. 911 Tex. —.

[2] Sec. 55 *post;* Coventry *v.* Atherton, 9 O. 35.

[3] Wood on Lim., sec. 120.

[4] Carney *v.* Havens, 23 Kan. 82.

[5] Kinkead's Code Pldg., sec. 477; Claflin *v.* Case, 53 Kan. 560.

[6] Kinkead's Code Pldg., sec. 480.

[7] Kinkead's Code Pldg., secs. 484, 487. When time begins to run, the weight of authority seems to be that, where the land conveyed is actually occupied by another, under an adverse and better title, the covenant is broken, without any other act by either party, and an action may be at once maintained upon it. Claflin *v.* Case, 53 Kan. 560, 562, citing Rawle Cov., sec. 139; Moore *v.* Vail 17 Ill. 185; Shattuck *v.* Lamb, 65 N. Y. 499. And if the grantee permits such adverse possession to ripen by lapse of time into a good title, he is without remedy on his covenant. *Id.*, citing Rindskopf *v.* Loan Co., 58 Barb. 36.

[8] Wood on Lim., sec. 124; Triplet *v.* Foster, 115 N. C. 335.

[9] Hill *v.* Henry, 17 O. 9, 12. The doctrine seems to be doubted in Darling *v.* Wooster, 9 O. S. 518, 519; but the above case is not overruled. It is assumed as correct in Kilbreath *v.* Gaylord, 34 O. S. 308. Wood on Lim., sec. 124; Angell on Lim., sec. 95.

[10] Wenman *v.* Ins. Co., 13 Wend. 267.

[11] Wolfe *v.* Whiteman, 4 Har. (Del.) 246; Bowman *v.* McChesney, 22 Gratt. 609.

[12] Bush *v.* Stowell, 72 Pa. St. 208; Easterbrook *v.* Moulton, 9 Mass. 258.

whole note will become due, the statute runs upon the whole note from that date.[1] Upon a bill of exchange payable a certain number of days after sight the statute runs in favor of the drawer, from the date of the dishonor and notice thereof.[2] Upon a check drawn upon a bank in which the maker has no funds, the statute runs from the date of the check.[3] The statute runs upon a due bill from its execution, as it is payable at once without demand.[4] Days of grace having been abolished in Ohio, they are not to be taken into consideration in the computation of time.[5] Where a note due one day after date was given and at the same time, and as a part of the agreement, the obligees gave the obligor an instrument of writing agreeing that the latter should have five years in which to pay, it was held that no right of action accrued until the expiration of the five years.[6]

Sec. 50. When statute begins to run—Miscellaneous cases.—In actions for relief between partners *inter se* the statute begins to run from dissolution of partnership;[7] upon an action for money received by one to and for the use of another, from the day of the receipt of the money;[8] upon an action by a surety against his principal or co-surety for money paid by him, from the date of the payment of the money.[9]

1.—*The right of a remainder man* succeeding to an estate after the termination of a life estate does not accrue until the death of the tenant for life, although his estate may be determined during his life. Hence the statute does not begin to run against him until the death of the life tenant, no difference what other possession may precede that.[10] Where the right or estate of children does not accrue until the death of a tenant for life, the statute does not begin to run against them until after his death.[11]

2. *Where subscriptions to stock* in a corporation are payable

[1] Hemp *v.* Garland, 4 Q. B. 519

[2] Woode *v.* McMeans, 23 Tex. 481.

[3] Brust *v.* Barrett, 16 Hun 409.

[4] Darling *v.* Wooster, 9 O. S. 518; Douglass *v.* Sargent, 32 Kan. 413.

[5] 92 O. L. 61.

[6] Round *v.* Donnell, 5 Kan. 54.

[7] Gray *v.* Kerr, 46 O. S. 652. Generally as between partners, the statute will not commence running until the partnership has ceased to exist, and generally not until there has been a settlement of the partnership affairs or an adjustment among themselves. Green *v.* Williams, 21 Kan. 72.

[8] Mills *v.* Mills, 115 N. Y. 80.

[9] Hammond *v.* Myers, 30 Tex. 375; Singleton *v.* Townsend, 45 Mo. 379.

[10] Holt *v.* Lamb, 17 O. S. 274. *Statute does not run against party interested until his right of entry accrues to him.* Thus where lands are devised for life to one person with remainder over in fee to another, the possession of a third person, under the tenant for life, is not adverse within the meaning of the statutes of limitation, as against the remainder man until the person to whom the life estate was given is dead. Carpenter *v.* Denoon, 29 O. S. 379.

Does not run against the heirs of the wife until the husband's life estate (Dower) terminates by his death. Koltenbrock *v.* Cracraft, 36 O. S. 584.

[11] Holt *v.* Lamb, 17 O. S. 374 (1867).

upon call, an action thereon accrues only when such call is made, and the statute begins to run from the date of the call.[1]

3. *Stockholders' liability.*—To set the statute of limitations running against a creditor of a corporation in favor of the stockholders on their statutory liability, it is necessary that the creditor's claim be reduced to judgment, and execution returned unsatisfied, or, that the property of the corporation, by some legal proceeding, be put in process of application to the payment of its debts, so as to render judgment and process against it impossible or nugatory, as where the corporation has been dissolved, or thrown into bankruptcy, or placed in the hands of a receiver, or has made an assignment of its property for the benefit of its creditors.[2]

4. *Trespass.*—When one commits an act of trespass on another's land, and causes an immediate injury, which shows itself to its full extent, he is liable at once for this act and its effects, and time begins to run in his favor at once; but not so when the injurious effect does not appear at once, or not in its fullest consequences.[3] Where the complaint is for cutting down and carrying away timber, the trespass may be considered as two parts of a continuing trespass, and the statute will begin to run only from the completion of the carrying away.[4]

Sec. 51. Absence from State.—If, when a cause of action accrues against a person, he is out of the State[5] or has absconded,[6] or concealed himself,[7] the period limited for the

[1] Gibson *v.* Ry.Co., 18 O.S.396; Warner *v.* Callender, 20 O. S. 190. *When the statute begins to run.* Held that a subscriber, or his assignee to stock in a railroad company, may, upon making tender of the unpaid installment with interest that may be due thereon, maintain an action in equity against the corporation to compel the issuance of the stock—the statute of limitation will begin to run from the time of such surrender. Iron R. R. Co. *v.* Fink, 41 O. S. 321. And when subscribers to the stock of an insurance company give their promissory notes for stock taken, it has been held that from the nature of the transaction the notes were intended to be payable on the call of the directors, and the statute was no more available as a defense against the collection of the notes, than it would have been against the collection of the subscription. Kilbreath *v.* Gaylord, 34 O. S. 305.

[2] Bronson *v.* Schneider, 49 O. S. 438, citing Hawkins *v.* Furnace Co., 40 O. S. 507; Morgan *v.* Lewis, 46 O. S. 1; Barrick *v.* Gifford, 47 O. S. 180.

[3] Valley Ry. Co. *v.* Franz, 43 O. S. 626. Commences as soon as the injurious act is perpetrated, though the actual injury is subsequent and could not immediately operate—4 Ohio 331.

[4] Sullivan *v.* Davis, 29 Kan. 28.

[5] Time of absence of U. S. Senator excluded. Lane *v.* Bank, 6 Kan. 75. The absence must be such as prevents service. 32 N. H. 452; 38 N. H. 35.

[6] "In those States where the statute is only saving when the debtor absconds from the State, in order to avail himself of the saving of the statute, it is incumbent upon the plaintiff to show that the defendant actually absconded from the State, that is, left it secretly; and if he left openly the statute is not saved, although the debtor does not return to the State again." 2 Wood on Lim., sec. 248. Absconding refers to such conduct as prevents service of process. Hogget *v.* Emerson, 8 Kan. 262.

[7] "The concealment of the debtor, which saves the statute in those States where a provision of that kind exists, need not be fraudulent, but a change of residence several times by the debtor

commencement of the action shall not begin to run until he comes into the State, or while he is so absconded or concealed; and if, after the cause of action accrues, he depart from the State, or abscond, or conceal himself, the time of his absence or concealment shall not be computed as any part of the period within which the action must be brought.[1] A return to the State will set the statute running, but to do so it must be open and notorious, and not secretly. A clandestine return for a few hours during the night-time or on Sunday is not sufficient to set the statute running,[2] nor will occasional visits into the State for temporary periods be sufficient to set the statute running.[3]

A mere temporary absence from the State upon business with no intention of remaining permanently, is not such absence as is contemplated by the statute as will prevent or suspend its running.[4] It has been held also that a man who, retaining his domicile in one State, but *resides* in another State for a certain period, is considered as absent from the State.[5] But this would be a questionable rule if the person kept up his *domicile residence* where service of process could be had by leaving a copy thereat, though it has been held that an absence for years though the debtor's family remained within the State, is to be be deducted.[6] There is no difference in principle between the suspension of the running of the statute resulting from an express waiver and one caused by voluntary act in absenting oneself from the State.[7]

Sec. 52. Demand necessary to start statute running—In what cases.—There are numerous instances where demand is necessary before a cause of action will accrue, and consequently start the statutes of limitation running from the date of the demand when made.[8] In all cases where demand is necessary to fix the liability of the party, the statute of limitation is not put in motion until demand is made.[9] As for example, a cause of action against a sheriff for not paying over money collected on execution, demand must be made before an action will accrue

without informing the creditor has been held sufficient." 2 Wood Lim., sec. 249.

[1] R. S., sec. 4989. Cases under former statutes: Coventry *v.* Atherton, 9 Ohio, 35; Lockwood *v.* Wildman, 13 Ohio, 430; Sullenberger *v.* Gest, 14 Ohio 204.

[2] Engel *v.* Fischer, 102 N.Y. 404, and cases cited. See Poillon *v.* Lawrence, 77 N. Y. 208; Sleght *v.* Kane, 1 John. Cas. 76.

[3] Stanley *v.* Stanley, 47 O. S. 225; Bennett *v.* Cook, 43 N. Y. 537; Gibbons *v.* Ewell, 1 H. 562.

[4] Armfield *v.* Moore, 97 N. C. 34; Frost *v.* Brisbin, 19 Wend. 11. See 38 Me. 171.

[5] Haggart *v.* Morgan, 5 N. Y. 422; Burroughs *v.* Bloomer, 5 Denio 532.

[6] 44 N. H. 446.

[7] Wood *v.* Goodfellow, 43 Cal. 185.

[8] Maxwell's Code Plg., p. 475.

[9] Wood on Lim., sec. 118.

therefor;[1] and so where one who lawfully comes into possession of property, demand and refusal are necessary before an action in replevin can be maintained for recovery thereof;[2] and so where money is deposited for safe keeping with another and not as a loan;[3] and so where one person gives to another a bond as collateral security, which is held by such person after the debt is paid, demand is necessary to create a cause of action and set the statute running.[4] Wherever demand is necessary and none is shown to have been made, the presumption is that it was properly made.[5]

Sec. 53. Knowledge necessary to set statute running—When.—By positive provision of statute an action for relief on the ground of fraud does not accrue until the fraud is discovered by one in whose behalf the cause of action may be sustained, and the statute begins to run only from the date of the discovery.[6] This was the equitable rule of procedure.[7] There are certain well defined rules governing this matter which must be thoroughly understood. It is not that mere want of knowledge which prevents the statute from running;[8] that may be easily feigned. Then also want of knowledge is not always excusable; ordinary care, as it were, must be observed with reference to the subject matter, so that with such observance the fraud might have been discovered. If there is an opportunity or means of discovering the wrong, the party must be held to have known it; it is his business to know it under such circumstances. Concealment by mere silence may not always suffice, unless there be silence where there is a duty to speak. The exception is where there is such concealment or artifice which amounts to fraud,[9] the lack of knowledge whereof prevents the statute running. And so in an early case it is held that in equity the lapse of time is applied in analogy to the statute of limitation, reckoning the same from the time of the discovery of or the acquirement of knowledge of the mistake.[10] But this doc-

[1] State *v.* Newman, 2 O. S. 567; King *v* Nichols, 16 O. S. 80; Keithler *v.* Foster, 22 O. S. 27.

[2] Does not run until bailee denies bailment and converts property. Blount *v.* Beall, 22 S. E. 52.—The statute begins to run from the demand upon the bailee and not from the time of the conversion of the property. Moore *v.* William, 26 N. Y. Supp. 766.

[3] Tidd *v.* Overell, 3 Reports, 657 (1893), 3 Ch. 154.

[4] Auld *v.* Butcher, 22 Kan. 400.

[5] Kethler *v.* Foster, 22 O. S. 27.

[6] R. S., sec. 4982; Maple *v.* Railroad Co., 40 O. S. 313.

[7] Pratt *v.* Longworth, 27 O. S. 159.

[8] State *ex rel v.* Standard Oil Co., 49 O. S. 188.

[9] State *ex rel v.* Standard Oil Co., 49 O. S. 188.

[10] Ormsby *v.* Longworth, 11 O. S. 653. Courts of equity do not act in obedience to the statute of limitations, "but will apply the doctrine of neglect and lapse of time according to the discretion, regulated by precedents and peculiar circumstances." Hoffman V. C., in Lawrence *v.* Trustees, 2 Denio 581.

trine has been repudiated in a late case, though *Ormsby v. Longworth* is not specially mentioned by the court in its opinion, but was cited in counsel's brief. It was held in Bryant *v.* Swetland,[1] that a cause of action to reform an instrument for mistake accrues upon the execution of the instrument, and the time the statute begins to run is not postponed to the discovery of the mistake, as it is to the discovery of fraud, in actions for relief on that ground. Nor does the statute begin to run against a *cestui que trust* until he may have knowledge, or may fairly be presumed to have knowledge of the existence of the trust.[2] Nor does it run against an infant barring its rights until he discovers the wrong.[3] And where the defendant at the time of receiving money sued for was acting as agent for plaintiff, such money being received as such agent, the statute will not begin to run until the plaintiff has knowledge of the wrongful detention of the money.[4]

Sec. 54. Computation of time.—Without going into an elaborate discussion of the subject and disregarding the conflict in earlier decisions, the simple statement may be made that in reckoning time under the statutes of limitation, the rule is, that fractions of a day are not recognized, and the first day, or the day when the act is done or the cause of action accrues, is excluded.[5] "When a year is mentioned in legislative or judicial proceedings, and no mention is made of any system of reckoning, the Christian Calendar is understood to be used."[6]

Sec. 55. Continues to run.—As a general rule, and unless provision is otherwise made, when a statute of limitation begins to run against a cause of action, it continues to run until the same is barred.[7] It does not begin to run until there is some

[1] 48 O. S. 194.

[2] Carlisle *v.* Foster, 10 O. S. 198. Does not begin to run against a *cestui que trust* in possession until ouster, whether the trust be express or implied. Lakin *v.* Sierra & G. Co., 25 Fed. 337.

As between trustee and *cestui que trust* the statute will not begin to run until an unmistakable disclaimer of the trust is known to a beneficiary competent to sue. As between a third party and the trustee or his beneficiary, the statute begins and runs in its ordinary manner. Veazie *v.* McGugin, 40 O. S. 365, 376.

[3] Long *v.* Mulford, 17 O. S. 485.

[4] Perry *v.* Smith, 31 Kan. 423. So generally with reference to principal and agent.

[5] Hook *v.* Bixby, 13 Kan. 164. See 13 Am. & Eng. Enc. of Law, 747.—This is the rule, says Wood on Limitations, sec. 54, p. 122, Texas, Alabama, New York, Missouri, Michigan and Connecticut adopting it.

[6] Engleman *v.* State, 2 Ind. 91.

[7] Coventry *v.* Atherton, 9 O. 35; Green *v.* Goble, 7 Kan. 297; Granger *v.* Granger, 6 O. 35; Mr. Wood, sec. 6, in his work on Limitations, says: "One of the most important and universal rules (which is not, however, without exception) is, that time, when it has once commenced to run in any case, will not cease to do so by reason of any subsequent event, which is not within the saving of the statute." When the statute begins to run it will not stop

one to sue, or liable to be sued.[1] Thus where a wife having a separate estate lends her husband money, no cause of action can accrue till his death, hence the statute does not begin to run until his death.[2] It cannot run where the claimant cannot maintain an action.[3] That a party may take advantage of the disabilities to prevent the statute from running they must have existed prior to the accrual of the cause of action, as the running of the statute is not arrested by the subsequent disability.[4] If the cause of action accrued in the lifetime of the party liable, the running of the statute is not interrupted by his death.[5] The statute may be arrested, however, by agreement of parties as in the case of adverse possession.[6]

Sec. 56. Suspension of operation.—As has heretofore been explained in the section treating of the nature and origin of the statutes of limitation, the prevailing view was that they were based upon the presumption that the debt which had become barred by lapse of time had been paid, and before there had been any legislative action upon the subject there was considerable litigation involving the question as to the effect of the payment or the acknowledgment of the debt after a lapse of time sufficient to bar the claim. It was argued that, where there had been payment or an acknowledgment made, the supposed reason of this statute ceased to exist. But very wisely this matter has not been left entirely for the courts to decide without something for their guide. The law-making power of the State has undertaken to, and it has prescribed, what acts shall have the effect of suspending the operation of the statute; or, in other words, what facts shall operate to take the acts out of the statute and relieve it from its operation.[7] When payment has been made upon any demand founded on contract, or a written acknowledgment thereof, or promise to pay the same has been made and signed by the party to be charged, an

unless the statute expressly provides that it shall stop. Sherman *v.* Western & C. Co., 24 Ia. 515. So, if it has commenced to run in the life time of the ancestor, it will continue to run against the infant heirs. Patterson *v.* Hansel, 4 Bush. (Ky.) 654. Where the bar of a statute has become complete as between an executor and a legatee under the will such bar will not be defeated, by an order of the probate court directing a final settlement and distribution of the estate, or by the payment of other legacies by the executor. Webster *v.* Bible Soc., 50 O. S. 1. The death of a creditor does not suspend the running of the statute of limitations against his claim, when the statute has once begun to run. Green *v.* Goble, 7 Kan. 297.

[1] Granger *v.* Granger, 6 O. 35; Richards *v.* Ins. Co., 8 Cr. (U. S.) 84; McNair *v.* Dodge, 7 Mo. 404.

[2] Towers *v.* Hagner, 3 Whart. (Pa.) 48; Payne *v.* Harris, 3 Strob. (S. C. Eq.) 39.

[3] Leasure *v.* Mahoning Tp., 8 Watts. (Pa.) 551.

[4] Hinde *v.* Whitney, 31 O. S. 53.

[5] Irwin *v.* Garretson, 1 C. S. C. R. 533. See 1 Wood's Lim., p. 12 and n. 7.

[6] Dietrick *v.* Noel, 42 O. S. 18.

[7] Hill *v.* Henry, 17 O. 9; Bissell *v.* Jandon, 16 O. S. 498, 510.

action may be brought thereon within the time herein limited after payment, acknowledgment, or promise.[1]

Sec. 57. Saving in case of reversal—Or failure not on merits.—If, in an action commenced[2] or attempted to be commenced, in due time, a judgment for the plaintiff be reversed;[3] or if the plaintiff fail otherwise than upon the merits, and the time limited for the commencement of such action has, at the date of such reversal or failure, expired, the plaintiff, or, if he die and the cause of action survive, his representative, may commence a new action within one year after such date; and this applies to any claim asserted in any pleading by the defendant;[4] and has reference to the limit of time within which an original action may be recommenced, and does not refer to proceedings in error.[5] The second cause of action, however, must be substantially the same as the first.[6] The section merely operates to continue alive a right of action for one year after the failure of a prior action otherwise than upon its merits.[7] The question to be determined when seeking to take advantage of this saving clause, is: what is a failure of a cause otherwise than upon the merits? A failure in the action by the plaintiff otherwise than upon the merits, imports some action by the court, by which the plaintiff is defeated without a trial upon the merits.[8] To fail means to be unsuccessful or defeated. To fail otherwise than upon the merits just as clearly means a defeat upon some trial or contest short of one upon the merits.[9] An instance of failure otherwise than upon the merits is where an irregular service is set aside, in which case the plaintiff may bring his action anew, even though the limitation has expired between the time of instituting proceedings and the time of setting aside the service;[10] and so where the action is dismissed by the court (not a voluntary dismissal) without prejudice to a future action, the plaintiff may take advantage of the saving clause, and may commence an action within a year after the dismissal.[11] Under a statute authorizing it,[12] an action may be dismissed without prejudice

[1] R. S., sec. 4992. The presumption of the payment of a claim arising at common law, from the lapse of time, may be rebutted by proof that it remains due and unpaid, or by proof that the debtor, within the period required to raise such presumption, acknowledged such claim to be an existing liability. Bissell *v.* Jandon, 16 O. S. 498. See Parsons on Contracts.

[2] Kinkead's Code Plg., sec. 7 (2d ed.).

[3] "The reversal of the judgment involves the actions of the court which may render it necessary, or proper, for the plaintiff to commence a new action." Siegfried *v.* R. R. Co., 50 O. S. 296.

[4] R. S., sec. 4991.

[5] Atcherly *v.* Dickinson, 34 O. S. 537.

[6] Hiatt *v.* Auld, 11 Kan. 176.

[7] Shively *v.* Beeson, 24 Kan. 352.

[8] Siegfried *v.* R. R. Co., 50 O. S. 294.

[9] N. Y., L. E. & W. R. R. Co *v* Siegfried, 7 O. C. C. 33, affirmed: 50 O. S. 294.

[10] Meisse *v.* McCoy, 17 O. S. 225

[11] Bates *v.* R. R. Co., 12 O. S. 620.

[12] R. S., sec. 5314.

by the plaintiff, before the final submission of the case to the jury, or to the court. From the view taken by the courts the construction to be placed upon this provision is that the dismissal must be upon order of the court, and not a voluntary dismissal by the plaintiff. For it has been held that a voluntary dismissal of an action by the plaintiff, not produced by any adverse ruling of the court, or compulsion of any kind, is not a failure otherwise than upon the merits, within the meaning of the section. A dismissal by the plaintiff involves no action by the court; it is a voluntary withdrawal of his case, and is not a failure of the action. One cannot fail in something he does not undertake. Nor does the dismissal of an action without prejudice to a future action extend the period of limitation.[1] And a new action for the same cause, thereafter commenced, is barred, though commenced within one year after the dismissal of the former action.[2] A stipulation by the attorneys at the time of dismissing the first action "that it should be without prejudice of service or otherwise to the action commenced this day," etc., is not a stipulation that the statute of limitations should not be relied upon by a defendant in a second action.[3] A party failing otherwise than on the merits in a lower court, who prosecutes error to the court above, may, on affirmation of the judgment within one year after such affirmation, commence a new action.[4]

Sec. 58. Saving by part payment.—When payment has been made upon any demand founded on contract, an action may be brought thereon within the time limited by the statute after such payment.[5] This necessarily means part payment, and implies an admission of a greater sum being due.[6] To have the effect of taking the debt out of the statute it must be a payment of money or its equivalent and applied or appropriated to the debt,[7] or interest.[8] The payment must be a portion of

[1] N. Y., L. E. & W. R. R. *v.* Siegfried, 7 O. C. C. 33. See very thorough opinion in this case.

[2] Siegfried *v.* R. R. Co., 50 O. S. 294.

[3] Hiatt *v.* Auld, 11 Kan. 176. See McWhirt *v.* McKee, 6 Kan. 412.

[4] Cummings *v.* Dougherty, 31 W. L. B. 140. This case was reversed by the Circuit Court on the ground that the cause did not fail otherwise than upon the merits. Dougherty *v.* Cummings, 9 O. C. C. 718.

[5] R. S., sec. 4992.

[6] "The meaning of part payment of the principal is not the naked fact of the payment of a sum of money, but payment of a smaller on account of a greater sum due from the person making the payment to him to whom it is made, which part payment implies an admission of such greater sum being due." Waters *v.* Tompkins, 2 C. M. & R. 722.

[7] Kaufman *v.* Broughton, 31 O. S. 424; Blanchard *v.* Blanchard, 122 Mass. 562.

[8] Payment of interest has the same effect as part payment of principal. Conwell *v.* Buchanan, 7 Blackf. (Mo.) 537; Sanford *v.* Hayes, 19 Conn. 591; Barron *v.* Kennedy, 17 Cal. 574; Sigourney *v.* Drury, 14 Pick. 387; Smith *v.* Ludlow, 6 John. 267

an admitted debt, and on account of the debt, a greater amount than paid to and accepted by the creditor.[1] The fact that the payor of a note had a claim against the holder of the note at the time the statutory bar on the note became complete, which might have been used as a set-off, had the holder sued at that time on the note, cannot be looked upon as a part payment, especially where the holder of the note refused to recognize the claim.[2] A payment upon a claim after it is barred, will not revive it unless that be shown to have been the intention of the parties.[3] If the creditor would enforce collection he must do it on the subsequent promise.[4]

Sec. 59. Payment by whom and to whom.—The payment contemplated by the statute must be made by the party to be affected thereby or by an agent authorized for that express purpose.[5] And it may be made to an agent, or to one appearing to be authorized to receive it.[6] Payment made, however, by an assignee in the way of a dividend is held not sufficient to take the balance of the debt out of the statute as to the debtor.[7] A payment by a principal debtor holds the debt still good as against surety.[8] Part payment on a joint and several note, by one of the makers, will not prevent the statute running as to other makers.[9] It will generally be presumed, where a payment is shown to have been made, but where it is not shown who made it, that the party who is under legal obligation to make it, did make it.[10] Where the community of interest of joint obligors has been severed by the death of a joint contractor, payment by his personal representative will not take the note out of the statute as against the surviving contractor.[11]

Sec. 60. Evidence of part payment.—The burden of proving that the payment was in fact made by the defendant and as part payment, and is sufficient to remove the statutory bar, rests upon the plaintiff.[12]

[1] Wood on Lim., sec. 97; Bogart *v.* Cox, 4 O. C. C. 289.

[2] Hubbard *v.* Ins. Co., 25 Kan. 172.

[3] Kaufman *v.* Broughton, 31 O. S. 420; Hill *v.* Henry, 17 O. 9.

[4] *Id.*

[5] Marienthal *v.* Mosler, 16 O. S. 566.

[6] Angell on Lim., sec. 269 (6th ed.).

[7] Marienthal *v.* Mosler, 16 O. S. 566; Richardson *v.* Thomas, 13 Gray, 381. Held *contra* in Kansas. Letson *v.* Kenyon, 31 Kan. 301. Payment of dividend by *assignee* on a claim barred by the statute and not expressly scheduled by the assignor does not take the claim out of statute. White *v.* Boot & Shoe Co., 51 Kan. 34.

[8] Glick *v.* Crist, 37 O. S. 388; Steele *v.* Souder, 20 Kan. 39.

[9] Hance *v.* Hair, 25 O. S. 349. But held that a petition against several makers of a joint and several note more than fifteen years past due, whereon payments have been made within the period of limitation, where it did not appear who had made such payments, does not show a bar in favor of any of the defendants. Vore *v.* Woodford, 29 O. S. 245.

[10] Pears *v.* Wilson, 23 Kan. 343, 346.

[11] Root *v.* Bradley, 1 Kan. 437.

[12] Easter *v.* Easter, 44 Kan. 151.

Sec. 61. Saving by new promise.—The new promise, as we have seen, to be sufficient to prevent the debt from becoming barred, must, since the code, be a written promise signed by the party to be charged.[1] To have the effect of suspending the operation the acknowledgment must be made within the time limited. It must be made before the action is barred; as a cause of action cannot be *revived* by a promise made after bar, though the original indebtedness is a sufficient moral obligation to sustain a subsequent promise.[2] And it must be an unqualified and unconditional promise or acknowledgment.[3] This is so because the new promise acts not by reviving the old promise, but by creating a new one.[4] It should also plainly specify the particular debt or demand.[5] Where a new promise or acknowledgment has been made, the plaintiff may of course state the barred demand as a consideration of the new promise and allege the new promise in writing as the cause of action.[6] A promissory note executed by a member of a firm after its dissolution in consideration of a balance due up on an account with the firm, will not, in the absence of express authority to execute it, operate to take the demand out of the statute as to the other partners.[7]

[1] R. S., sec. 4992; Cleveland *v.* Duryea, 1 C. S. C. R. 324; Horsely *v.* Billingsey, 19 O. S. 413. No action can be maintained by the holder against the maker of a promissory note, the action on which is barred by the statute; on a verbal promise to pay the same, made after the bar of the statute had arisen, the consideration of the promise being the original debt. Stephenson *v.* Line, 7 O. C. C. 147.

[2] Hill *v.* Henry, 17 O. 14; Haymaker *v.* Haymaker, 4 O. S 272, 284; Spalding, J., in Turner *v.* Moore, 20 O. 338, said: "I should feel better satisfied with the establishment of a rule that required the suit to be predicated upon a new promise; for I must confess, the reasoning of the judges in the cases examined, has failed to convince me that the practice was sound in the inception. . . . That a new promise is in law available to sustain a recovery upon an old contract, extinguished by an act of bankruptcy, I do not for a moment doubt. A payment of an account to be available to take the case out of the statute, it must appear that there was an agreement or understanding between the debtor and the owner of the account that the credits given should be regarded and treated as part payment of the same." Kaufman *v.* Broughton, 31 O. S. 428. An entry of credit in an account book after a cause of action is barred, is not of itself sufficient evidence. *Id.* Hamilton *v.* Coffin, 45 Kan. 556. But it was held (construing the act of 1831) that an item of an account could not be taken out of the statutory bar on the ground of an implied acknowledgment, or of a promise to pay, arising from a subsequent item in the account, unless the latter item be within six years of the former item and within six years before commencement of suit. Courson *v.* Courson, 19 O. S. 454.

[3] A vague or conditional promise, or a mere acknowledgment of the debt, will not make him liable. Turner *v.* Moore, 20 O. 333, 339; Hanson *v.* Towle, 19 Kan. 273. "I will attend to them both as soon as possible," not sufficient. Bidwell *v.* Rogers, 10 Allen, 438 "If I were able I should pay all my debts," not sufficient. Manning *v.* Wheeler, 13 N. H. 486.

[4] Hurst *v.* Parker, 1 B. & A. 92.

[5] Martin *v.* Broach, 6 Ga. 21.

[6] Sturges *v.* Burton, 8 O. S. 215, 220; R. S., sec. 4992.

[7] Kerper *v.* Wood, 48 O. S. 613 (even in a State where the laws authorize such partner, as liquidating partner, to execute a note in settlement of the business of the firm that will bind the other members).

Sec. 62. Saving by acknowledgment.—The acknowledgment mentioned in the statute bears close relation and really amounts to a promise. In fact, a bare acknowledgment that the debt did once exist does not amount to anything unless there is an express promise to pay the debt ;[1] nor will a mere reference to the debt or a suggestion of some action concerning it avail anything.[2] It must be in writing and signed by the party charged according to the terms of the statute ;[3] and should be made to the creditor or to some one acting for him.[4] It must refer specially to the debt, and be distinct and unequivocal.[5] There is no particular form, just so it is in writing and signed. The appended note contains some illustrations.[6]

Sec. 63. Disabilities.—It has heretofore been stated in effect that the statute begins to run against a party immediately upon the accrual of an action, unless clearly within a saving clause, and that a statute will not be so construed as to imply the same.[7] In Ohio the disabilities are as to all the actions the same, substantially. If at the time the action accrues the

[1] Edgerton *v.* Coates, W. 84.

[2] Hanson *v.* Towle, 19 Kan. 273.

[3] Green *v.* Goble, 7 Kan. 297; R. S., sec. 4992. A new note and mortgage, the note bearing a different rate, and the mortgage being on a different piece of property and not received or accepted, held not admissible as evidence of the original debt. Green *v.* Goble, 7 Kan. 297.

[4] Smucker *v.* Sibert, 18 Kan. 104. Cannot be to stranger. *Id.*

[5] Palmer *v.* Gillespie, 90 Pa. St. 363.

[6] Where defendant wrote a letter as follows, "I think you are a little mistaken about my notes amounting to over eight hundred dollars. Even at compound interest they would not amount to that much. The whole amount, $600, on interest three years at 8 per cent. would only be $48, and for three years would be $144, making a grand total of $744, and you ask me to pay $300, would leave $444. If each share will be between $500 and $600, what is the use for me to pay more than is necessary merely to have it returned?" referring to the note sued upon, is a sufficient acknowledgment of an existing liability to relieve the action on the notes from the bar of the statute. Clark *v.* King, 54 Kan. 222, and cases. Where, in a suit to foreclose a mortgage in another State, within fifteen years from the date of the claim, the defendant consents to a decree ordering the sale on the mortgage premises, &c., such consent constitutes an acknowledgment of an existing liability within the meaning of the statutes (at 1831, 5th sec.), and an action in this State on such judgment will not be barred under the act, until fifteen years from the date of such acknowledgment. Bissell *v.* Jaudon, 16 O. S. 498.

Where one of the signers of a promissory note (who was in fact a *surety* thereon) wrote to the plaintiff saying, "You should write him (the principal on the note) a sharp letter and demand him an indorser there. I do not want to be held longer on the note," it was held that he thereby "acknowledged an existing liability" upon the note which would take the cause of action, which was barred by lapse of time, out of the operation of the statute. Elder *v.* Dyer, 26 Kan. 604. The statute in Kansas provides that a mere "acknowledgment of an existing liability" is sufficient; no *promise* is necessary. *Id.* But where the *surety* gave to the payees a new note signed by himself, it was held that the new note was not an acknowledgment of an existing liability on the part of the surety for the first note, nor a promise to pay it. Gregg *v.* Barnes, 32 Kan. 301. See also Wood on Lim., p. 193, &c.

[7] See 2 Wood on Lim., sec. 252.

person entitled to bring an action for the recovery of real property, or other actions under R. S., sec. 4977, is within the age of minority, of unsound mind, or imprisoned, such person may after the expiration of twenty-one years from the time the cause of action accrued, bring such action within ten years after such disability is removed.[1] R. S., sec. 4986, inclusive of Secs. 4979 to 4986, provides that a person entitled to bring any action mentioned in this subdivision, except for a penalty or forfeiture, is, at the time the cause of action accrues, within the age minority,[2] of unsound mind,[3] or imprisoned, such persons may of bring such action within the respective times limited after the disability is removed.[4] The provision of section 4986 is not a saving clause merely to persons under disability, but forms an exception to a general rule, and excepts those persons therein named from the operation of the general provision, section 4979.[5]

Sec. 64. Disabilities continued—Purely personal—The privileges extended by the saving clauses are purely personal, and will not, excepting in the case of contesting a will,[6] protect others.[7] A disability which saves the estate of one of several heirs, is no protection to the co-heirs in actions for the recovery of land.[8] But this cannot apply where there are several jointly interested.[9]

Sec. 65. Disability must exist at time the right of action accrues.—The privilege extends only to disabilities existing at the time when the right or cause of action first accrues.[10]

[1] R. S., sec. 4978.

[2] Mr. Wood, at sec. 238 of the second volume of his work on Lim. of Actions with reference to the disability of infancy, says: "An infant in law is a person, who by reason of his tender years is regarded as incapable of contracting, and who can neither sue nor be sued thereon. In most of the States all male persons under the age of twenty-one years, and all females under the age of eighteen years, are infants, within the meaning of the term as used under this head. Persons who have not attained the age of majority are infants, and in those States where infancy is within the saving clause of the statute, the statute does not begin to run against him or her, even though he or she has a guardian who might sue the claim in question; or even though other persons are jointly interested in the claim, who are of full age, until he or she attains the age of majority." In case of females the disability is removed at eighteen. R. S., sec. 3136. See Bormuth *v.* Beyer, 10 O. C. C. 291.

[3] The statute does not begin to run against such persons until restored to sanity, and until they have knowledge of the existence of the cause of action. Dicken *v.* Johnson, 7 Ga. 484; Little *v.* Downey, 37 N. H. 355. The insanity must have existed at the time the cause of action accrues. Allis *v.* Moore, 2 Allen, 306. If sanity is restored the statute begins to run and continues to run notwithstanding the party again becomes insane. Clark *v.* Trail, 1 Met. (Ky.) 35.

[4] R. S., sec. 4986.

[5] Bormuth *v.* Beyer, 10 O. C. C, 291.

[6] Secs. 44 *ante*, and 66 *post*.

[7] Bronson *v.* Adams, 10 O. 136.

[8] Moore *v.* Armstrong, 10 O. 12.

[9] See Sec. 66, *post*.

[10] Hinde *v.* Whitney, 31 O. S. 53. So where one is under disability if infancy alone, when her right first accrues, and

Sec. 66. Disabilities—When several jointly interested.—Although the privilege extended on account of disabilities is regarded as personal, as a rule,[1] yet, whether or not it may be extended to others depends upon the subject-matter. If the interests of several be joint, and the protection of the statute cannot be secured without covering other interests also, the disability of one must necessarily inure to the benefit of all. But if the interests are common and are capable of separation, the protection of the statute must be limited to persons within its provisions.[2] For example a proceeding in error may benefit all interested on the same side although not parties;[3] or a proceeding to contest a will. Thus, where a proceeding for the contest of a will is commenced within the statutory period of limitation, although only part of the persons interested are made parties, the right of action is saved as to all who are ultimately made parties, notwithstanding some of them are not brought into the case until after the period of limitation has expired.[4] And when one of several heirs bringing an action to set aside a conveyance for fraud, is a minor, within the saving clause, the rights of all are saved thereby from the bar of the statute.[5]

afterward marries before coming of full age, her coverture is not available as a disability within the statutes. Her action can be commenced only within ten years after she becomes of full age. Cozzens *v.* Farnan, 30 O. S. 491.

[1] *Ante*, Sec. 64.

[2] Trimble *v.* Longworth, 13 O. S. 431, 442; Meese *v.* Keefe, 10 O. 362, 364; 10 O. 11, 135.

Where the subject-matter in controversy is capable of division, where a privilege, for instance, is expressly given to a *feme covert* by law, solely on account of her coverture, the privilege cannot be jointly extended to others without there be a necessity for it. In such a case a separate bill should be filed. It may frequently happen that interests which were common to all when the decree was taken, may afterward become separate and adverse, within the time limited for a bill of review, and thus furnish a case for a separate bill. Kay *v.* Watson, 17 Ohio, 27. Tenant in common whose rights may be vindicated by his separate action, is not protected against the statute, or lapse of time, by a disability of his co-tenant. Williams *v.* Society, 1 O. S. 478. Where the rights of each are *severable* the protection of the statute extends only to those within the protection of the statute. Moore *v.* Armstrong, 10 Ohio, 11. This rule applies to coparceners or tenants in common. *Id.* Bronson *v.* Adams, 10 Ohio, 135. The right to sue for real estate saved by the proviso in the act of limitation is personal, and is no protection to others. A tenant in common, whose rights may be vindicated by his separate action, is not protected against the statute of limitation, or lapse of time, by a disability of his co-tenant. Williams *v.* Society, 1 O. S. 478.

[3] Meese *v.* Keefe, *supra*.

Right of one plaintiff in error saves for all. Wilkins *v.* Phillips, 3 Ohio, 49. If the claim of review admitted severance under our practice, the saving of one's right would not extend to the others. Massie *v.* Mathews, 12 Ohio, 351, 353, citing Bronson *v.* Adams, 10 Ohio, 135. The service of summons in error upon one of the several defendants in error prevents the statute from running as to all. Buckingham *v.* Bank, 21 O. S. 131.

[4] Bradford *v.* Andrews, 20 O. S. 208, taking exceptions to Smetters *v.* Rainey, 14 O. S. 287. Powell *v.* Koehler, 51 O. S. 103.

[5] Riddle *v.* Roll, 24 O. S. 572. But see Moore *v.* Armstrong, 10 Ohio, 11, 16; where one of several persons having a joint estate labors under a disability which is within the saving of the statute, he may take advantage of it, but none others can

Sec. 67. Disabilities—Persons laboring under, may sue.—The statute is remedial and is intended to save and not suspend the rights of persons under disability; to protect, and not to incapacitate.[1] There is nothing to prevent one laboring under a disability from bringing his action at any time within the period of the disability. Thus an infant may sue by his guardian, and the statute cannot be set up against him, though in fact the cause of action accrued at a time that would bar the action had he not labored under the disability of infancy.[2]

Sec. 68. Disabilities—Married women.—Married women are not now within the saving clause of the statute of limitation.[3]

Sec. 69. How to take advantage of.—This has been sufficiently discussed in the author's former work,[4] but some additional suggestions are made here.

It was unnecessary at common law for the plaintiff to show in his declaration that his cause of action was not barred by the statute of limitation, as it was a matter of defense. And, as said, in some States the code has nowhere indicated an intention to shift the burthen of pleading from one party to the other, so that an allegation of time in which the cause of action accrued, may, in general, be wholly omitted.[6] The various rules established by the courts relating to the procedure with reference to the statutes of limitation are not entirely consistent, and are not in accord with reason and sound principles of pleading. None will question the proposition that the statute of limitation only affects the remedy. The theory of presumption of payment, or no rights from lapse of time, has been abandoned, so that it is now considered as a statute of repose and not an unconscientious defense.[6] Nor can it be denied that it is a personal privilege only, which may be waived.[7] So also do all unite in the opinion that to take advantage of the statute as a defense it must be pleaded in all actions other than those relating to title to real estate, and cannot be shown under a general denial,[8] excepting in actions for the recovery of real property.[9] In the face of all these acknowledged rules, it is said that the limitation may be "part of the right itself," in which case it should be alleged by the plaintiff, or it should be shown by him that the action is commenced within the limitation governing it; where it appears from the petition that the cause of action is barred, some extrinsic negative facts must be stated

[1] Trimble *v.* Longworth, 13 O. S. 431.

[2] Chandler *v.* Villett, 2 Saund. 117, c. l.

[3] 83 O. L. 74; R. S., sec. 4986.

[4] Pldg., sec. 1150.

[5] Backus *v.* Clark, 1 Kan. 303.

[6] See Sec. 6, *ante.*

[7] *Ante,* 6.

[8] Kinkead's Code Pldg., sec. 1150; as to waiver see *Id.*, sec. 104, p. 105, n. 9. Vore *v.* Woodford, 29 O. S. 245.

[9] *Id.* Kyser *v.* Cannon, 29 O. S. 359.

to relieve it from the bar.[1] This is so held in Ohio only with reference to fraud.[2] What is the objection to one's prosecuting his *remedy* upon a cause of action which may be unquestioned so long as the defendant does not object? If the defendant does not object, can the court? If the defendant be willing to file his answer, and try the case without insisting upon the *privilege* of the statute, will the court refuse to permit him so to do?[3] The most approved method or manner of interposing the plea of the statute of limitation is, where it is apparent upon the face of the pleading that the claim is barred, to file a demurrer specifying the objection as a special ground; in other words, file a special demurrer. If not so apparent upon the face of the pleading, the plea should be raised by the answer. A looser practice than this, however, has been upheld. It has been held that a general demurrer, where it is apparent on the face of the petition that the claim is barred, will lie, on the theory that no cause of action is stated. The result of the various adjudications is given in the note.[4] This matter has been determined by legislative enactment providing demurrer may be filed on the ground "That the action was not brought within the time limited for the commencement of such actions."[5]

[1] Bliss Code Plg., sec. 205; Phillips Plg., sec. 191.

[2] Combs *v.* Watson, 32 O. S. 228; Zieverink *v.* Kemper, 50 O. S 208. See Maple *v.* R. R. Co., 40 O. S. 313.

[3] Mr. Wood, in his work on Limitations, at sec. 7, says: "Another rule of great practical importance is, that the bar of the statute must be interposed by the diligence of the debtor, as early as possible, usually, unless otherwise provided by statute, on the pleadings previously to the hearing, and that it will not be raised by the court unsolicited; and also, that the protection afforded by the statute may be waived by the debtor, the best possible proof of the waiver being a payment. It is probable, however, that this rule is applicable solely to cases where by the statute the remedy only, not the right, is destroyed." This author does not cite any cases going to show that there is such a doctrine as the statute of limitation destroying a right, unless we can construe R. S., sec. 4979 *et seq.*, as absolutely prohibiting the commencement of actions after the period of limitation has expired, and has abrogated the rule of law that the statute affects the remedy only, there can be no causes in Ohio which will destroy the right. This has not clearly been decided.

[4] Hill *v.* Henry, 17 Ohio, 11; and see Kelley *v.* Wiseman, 2 Dis. 418. It was held that the court might take notice of the lapse of time without plea, or after pleas should be filed. But it is now the established rule that it is only available on demurrer, special or general, or by answer, as the case may require. Sturges *v.* Burton, 8 O. S. 219; 18 O. S. 67. Statute must be plead, when petition does not show the statutory bar. Huston *v.* Craighead, 23 O. S. 198. A general demurrer can raise the question of the statute of limitation. Valley R. R. Co. *v.* Franz, 43 O. S. 623, 625. Where the petition on its face shows the cause of action which is barred by the statute, no *legal cause of action is stated*, and a demurrer thereto on the ground that the petition does not state facts sufficient to constitute a cause of action (R. S., sec. 5062) raises the question of the statute of limitations as well as other defects in the petition, though the better practice is to specially state the objection of the statute. Seymour *v.* R. R. Co., 44 O. S. 12, and cases. See 15 Bull. 102. If the pleading be stopped anywhere by demurrer, the party may travel back through all the pleadings of his adversary and search for substantial defects. Harker *v.* The Mayor, 17 Wend. 199, 201. If the petition does not show on its face that the plaintiff's claim is barred, the only way in which a statute can be taken advantage of is by special plea.

[5] R. S., sec. 5061; amended, 94 O. L. ——.

Sec. 70. By whom taken advantage of.—The privilege of setting up the statute, as has been elsewhere stated, is a personal one.[1] Yet this rule is not universal, as there are other third persons in certain cases who can take advantage of it. The wife may be let in to defend an action against her husband, and may plead the statute.[2] When third persons have acquired interests in mortgaged property subsequent to the mortgage, they may invoke the aid of the statutes as against the mortgage, even though the mortgagor, as between himself and the mortgagee, may have waived its protection.[3] It is no defense to an action on a collateral security that the original claim is barred. The original claim does not concern the party owing the collateral obligation, and he could only plead the statute as to the latter.[4] The neglect of the creditor, whereby the estate of one surety is released, under the statute of limitations, from its direct liability, does not discharge a co-surety from his liability for the whole or any part of the debt.[5]

Sec. 71. Pleading statute after rule day.— The rule of practice governing this matter must necessarily be different under the view now taken of the statute as a defense, than formerly, when it was regarded in an unfavorable light. The language of Wood, J., in an early case[6] serves as an apt illustration, and is here quoted: "All the authorities, ancient and modern, and they are numerously cited by counsel, show that as a general rule such defense is inequitable, and not to be favored, and that the court will lend its aid to effect a trial on the merits, when it will sit, at least passive, while a defendant asks its assistance, to close the door against such inquiry and to avail himself of his own *laches*, in not paying the debt, by the bar imposed by the statute, unless he avails himself of such plea within the rule day. We do not say no case can be presented where this leave to plead the statute, out of rules, should not be given;

A general denial will not suffice. Parker *v.* Berry, 12 Kan. 351; Challis *v.* Coble, 37 Kan. 558.

Must be set up. Held, in an action of trespass for *mesne* profits, the cause of action having arisen before the adoption of the code, in which the petition claims damages for nineteen years' rent preceding the commencement of the suit, the defendant, to have the benefit of the statute, should insist on it as a bar, in his answer, or as a specific ground of demurrer. He cannot take advantage of it on the trial after simply denying the allegations of the petition. McKinney *v.* McKinney, 8 O. S. 423; Towsley *v.* Moore, 30 O. S. 184. Bar must be pleaded. Haymaker *v.* Haymaker, 4 O. S. 272; Lockwood *v.* Wildman, 13 Ohio, 430. But this is not necessary in an action for the recovery of real property. Wintermute *v.* Montgomery, 11 O. S. 442, 444, R. S. sec. 5782.

An answer denying title, plea of statute of limitations is surplusage. Kyser *v.* Cannon, 29 O. S. 359; Rhodes *v.* Gunn, 35 O. S. 387.

[1] *Ante*, sec. 64.

[2] Richards *v.* Tarr, 42 Kan. 547.

[3] Wood *v.* Goodfellow, 43 Cal. 185.

[4] Welsh *v.* Child, 17 O. S. 319, 322.

[5] Camp *v.* Bostwick, 20 O. S. 337.

[6] Sheets *v.* Baldwin, 12 O. 131.

but the circumstances, to let in the defense, must be peculiar. The authorities show a concurrent course of decisions in the English and American courts, that, after the expiration of the rule day, or when the issue is closed, or a party is in default, the plea of the statute of limitations ought not to be permitted; that it is a strict legal defense, and which a party may, and must, at his peril, see that he pleads in time, or its benefits to him are lost."

As shown by this quotation, it apparently was never considered as a rule that the party could not set up the plea of the statute after the rule day had expired. And in this connection we are reminded of what was said in the last preceding section as to whether or not the statutes of limitation ever in any case destroyed the right, or the cause of action, so as to render it necessary to negative in the petition the bar of the statute, by setting up any facts showing that there had been a remedy by the defendant. If that be the correct doctrine, which is very much doubted, then the subject (of this section) may be easily settled. The defendant would under that view undoubtedly have an absolute right to set up the statute of limitation after rule day, the same as he would of any other defense. But the very fact that the authorities have seemed inclined to the view that it is a matter which should be left to the discretion of the court as to whether or not the plea could be made, is against the theory that there can be a destruction of the cause of action by the running of the statute. It is an unquestionable rule that it is within the discretion of the court to receive or reject a plea of the statute after rule day has expired.[1] Where a demurrer is filed to the petition after rule day for filing the same, and the plaintiff makes no objection, but submits the case to final judgment on the demur, it is too late on error to object to such filing.[2] But where the court has refused to allow the plea of the statute to be set up in the supplemental answer, and where the parties during the trial have offered evidence upon the question as to whether or not the claim is barred, the court should properly regard the case as being tried upon the theory that the action was not brought in time; either that, or else the trial court will abuse its discretion in refusing to permit the supplemental answer to be filed.[3]

[1] Newson *v.* Ran, 18 O. 240; see also Wood *v.* Ward, 10 W. L. J. 505. Where leave to amend had been given defendant to file three amended answers, the last answer alleging as his sole defense the statute of limitation, the case having been pending over three years, the court refused to allow the last amendment on the ground that it was made so late and under such circumstances as the allowance thereof would not have been in furtherance of justice. Sanders *v.* Wakefield, 41 Kan. 11.

[2] Seymour *v.* R. R. Co., 44 O. S. 12.

[3] Ament *v.* Lotenthall, 52 Kan. 706. See also, upon this point, Allen *v.* Everly, 24 O. S. 97.

Sec. 72. Questions to be submitted to jury.—In an action on a false warranty, the question as to when the party first knew of the fraud is for the jury,[1] so is the question as to what particular indebtedness is referred to by a new promise,[2] or whether the debt sued upon is the one acknowledged, though whether or not the acknowledgment is in proper form, is for the court.[3] Following a familiar rule encountered so frequently in negligence, where there is dispute as to facts going to the proof of a new promise, it is for the jury ; when the facts are undisputed, then it is for the court to declare as matter of law whether the promise is sufficient to revive a barred debt.[4]

[1] Alpha Mills *v.* Waterton S. E. Co., 21 S. E. 917.

[2] Whitney *v.* Bigelow, 4 Pick. 112.

[3] Mastin *v.* Branham, 86 Mo. 643. "What kind of a promise or acknowledgment is suffered to take a case out of the act of the limitations, is for the court to decide; and the evidence offered to prove such promise or acknowledgment is proper to be submitted to the jury as in other cases, under the directions of the court." Oliver *v.* Gray, 1 Harr. & G. 204, 219. See 1 Wood on Lim., sec. 109.

[4] Clarke *v.* Dutcher, 9 Cow. 674.

CHAPTER III.

JURISDICTION.

SEC

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SEC. 73. Introductory.—The first question to be decided after concluding that a cause of action exists, is, where to commence the action, and what court has jurisdiction thereof. Under the codes where law and equity are administered by one court, the distinction between those two branches of the law so far as relates to jurisdiction is not of so much consequence. The statutes of the particular State, together with a few general principles, are the sources of information. As a judgment without jurisdiction is a nullity, a proper solution of the question as to where to bring the action is essential.

As jurisdiction cannot be properly acquired unless the action is brought in the right place, it is therefore apparent that it is so far dependent upon the law governing the venue of actions, that the two subjects—jurisdiction and venue—are appropriately considered together.

Venue is the place where the action is brought, which is now determined entirely by statutory provision. According to the former practice, it was necessary in local actions to allege in the declaration where the facts occurred or the cause of action arose; and in transitory actions, the venue could be laid in any county where the plaintiff chose. And while it is not now essential that the venue be formally alleged in the complaint, still it must appear, from the facts set forth, that the court in which the action is commenced has jurisdiction thereof. The facts alleged must show conclusively that the court has the power, under the statutes governing venue of actions, to hear and determine the controversy.

Sec. 74. Jurisdiction defined.—Jurisdiction may be defined as the power to hear and determine a cause, and to grant the relief asked and enforce the judgment pronounced.[1] There are several things requisite to complete this jurisdiction, as will appear in a subsequent section.[2] It seems apparent that it is something more or beyond the power to hear and determine as is generally given, and that power to grant the relief and enforce the judgment is equally essential.[3] Power to enforce the judgment means, necessarily, power to enforce it where possible within the jurisdiction. Some stress has been laid on the word "*hear.*" It is said that a judgment without hearing the defendant, or giving him an opportunity to be heard, is not a judicial determination.[4]

Sec. 75. Jurisdiction, how derived and conferred.—The source of all judicial power is in our constitution, which authorizes the creation or establishment of courts by the legislature, prescribing or limiting the jurisdiction. The legislature has only such power over the courts as are given it by the constitution.

In considering the question of jurisdiction over the subject-matter, reference must be had to the statutes relating to venue

[1] Sheldon *v.* Newton, 3 O. S. 499. Callan *v.* Ellison, 13 O. S. 452; Shroyer *v.* Richmond, 16 O. S. 455; Chapman *v.* Steel Co., 4 O. C. C. 245; United States *v.* Arredonda, 6 Pet. 709; Handy *v.* Insurance Co., 37 O. S. 370. It includes power to enforce the execution of what is adjudged. *In re* Ferguson, 9 Johns. 239; Fernold *v.* Speer, 3 Metc. 460.

[2] See sec. 87, *post.*

[3] See Freeman on Judgments, sec. 118.

[4] Windsor *v.* McVeigh, 93 U. S. 277. *Contra, ex parte* Bennett, 44 Cal. 84.

of actions; and this is true as to acquiring jurisdiction over the person, excepting that in some instances parties may by their voluntary act submit their person to the jurisdiction of the court. Jurisdiction of the subject-matter can never be conferred upon a court by any voluntary act of parties, but it must exist by some constitutional enactment of the legislature. [1]

But jurisdiction over the person, in cases where the court has jurisdiction over the subject-matter, may be acquired by voluntary act of submission by the parties. In the absence of such voluntary act, it must be acquired by proper service of process.

Sec. 76. Courts open to all persons.—The general jurisdiction of the court of common pleas, over the person of litigants, is not confined to residents or natural persons; non-residents of the State and foreign corporations are as much subject to its jurisdiction as are residents and domestic corporations. Except in actions of a local nature, our courts are open to all who may seek relief therein against any one who can be reached by its process. A voluntary corporation may voluntarily submit itself to the jurisdiction of the courts of a State.[2]

Sec. 77. Classifications or divisions—Defined.—The various classifications or divisions of jurisdiction are divided into:—General, Limited, Original, Appellate, Exclusive, and Concurrent, Each division is considered in the order named in subsequent sections.

Sec. 78. Courts of general and limited jurisdiction—Of record and not of record—Explained in a general way.—There are courts of general jurisdiction, and of limited jurisdiction. Formerly, or anciently, a distinction between the grades of courts was expressed by the terms, "*superior*" and "*inferior*" jurisdiction. We have also courts of record, and courts not of record. There is practical use for all these distinctions.

The purpose of the division into general and limited is to keep within their proper limitations, the powers of each. In a court of general jurisdiction its power is not limited or prescribed; what it may do in the exercise of its general jurisdiction is not defined, but extends to or comprehends whatever seems necessary in carrying out its general powers. For example, notice

[1] Schamp *v.* Kennedy, 9 Oh. Cir., Dec. 213. Parties cannot by private agreement or consent, nor by voluntary appearance (in the absence of facts which should estop them to deny the jurisdiction of the court) confer upon a court the power to hear and determine a cause upon error after the expiration of the time limited therefor. King *v.* Penn, 43 O. S. 57.

[2] Handy *v.* Ins. Co., 37 O. S. 366, 371

the statute[1] conferring or defining the jurisdiction of the court of common pleas in Ohio, which is the court exercising general jurisdiction. It merely says that: The court of common pleas shall have original jurisdiction in all civil cases where the sum or matter in dispute exceeds the exclusive original jurisdiction of justices of the peace. It leaves it open to the course of the common law and chancery courts. The statute does not curtail or limit its powers as a court of general jurisdiction. While it may be true that the jurisdiction of all courts in Ohio is expressly limited either by the constitution or by the statute, as we have just observed,[2] still the fact that the court of general jurisdiction has its powers and jurisdiction defined as above, makes it none the less a court of general jurisdiction, because it must exercise what jurisdiction is given it by the course marked out by the general unwritten law, which is far-reaching and without limit.[3] A court is one of general jurisdiction when it has unlimited jurisdiction over a certain class of cases, or when its authority extends to a great variety of matters.

A court is of limited jurisdiction when its power is confined to certain specified cases, and its judgment must be disregarded until such proceedings are shown as will confer jurisdiction.[4] While such a court must act within its general limitation of power, still it may do any and all things which are necessary to the exercise of its limited and prescribed powers, and hence it may do some acts which are not prescribed.

The other and remaining purpose of the division of courts into general and limited jurisdiction, is to facilitate the determination of the verity to be attached to judgments. A very important distinction has always obtained between courts of general and limited jurisdiction. Certain presumptions have been indulged in favor of courts of general jurisdiction which do not prevail in favor of those of limited jurisdiction.

All judgments are void unless the court has acted clearly within its power and jurisdiction, but to facilitate the determination of the question whether the court has acted within its jurisdiction, it is always presumed that a court of general jurisdiction has acted within its jurisdiction, whether the record shows upon its face that it has so acted or not. But no such presumption exists in favor of a court of limited jurisdiction, and its record must, *prima facie*, show that it had authority to render the judgment which it did.[5] When we come to the

[1] R. S., sec. 456.
[2] Schroyer *v.* Richmond, 16 O. S. 466.
[3] Galpin *v.* Page, 18 Wall. 350.
[4] Freeman on Judgments, sec. 122.
[5] Dakin *v.* Hudson, 6 Cow. 221; Cooley's Const. Lim., pp. 471, 491–4, 500, 508.

consideration of this question, however, the changes in the American jurisprudence demand a different division than into courts of general and limited jurisdiction. It is the policy of our law to attach as much verity to a court of limited jurisdiction, if a court of record, as to a court of general jurisdiction. In determining the verity of a judgment, therefore, we look more to the record. In the language of Ranney, Justice, "the distinction is not between courts of general and those of limited jurisdiction, but between courts of record, that are so constituted as to be competent to decide on their own jurisdiction, and to exercise it to a final judgment, without setting forth the facts and the evidence on which it is rendered, and whose records, when made, import absolute verity, and those of an inferior grade, whose decisions are not, of themselves, evidence, and whose judgments can be looked through for the facts and evidence which are necessary to sustain them.[1] In Ohio, this rule includes the only court of limited jurisdiction, which is a court of record, namely, the Probate Court.[2] The rule of presumption in favor of courts of general jurisdiction or of record, and against those of limited jurisdiction and not of record, is next explained in detail.

Sec. 79. Courts of general and limited jurisdiction—Of record and not of record, continued—Presumptions for and against.—The rule, that a presumption in law exists in favor of a court of general jurisdiction, or of a court of record, that it has acted within its power or jurisdiction, and that no such presumption prevails in favor of courts of limited jurisdiction or courts not of record, was formulated for the purpose mentioned in the preceding section (*ante*, sec. 78), to-wit, to aid in determining the verity of judgments.

It has always been regarded that, as courts of general jurisdiction were presided over by men of experience and legal knowledge, assisted by counsel learned in the law, their proceedings were consequently conducted with greater solemnity and deliberation, and in strict conformity with established modes, and according to the course of the common law, all of which is made a matter of record, while this was less apt to be

[1] Sheldon *v.* Newton, 3 O. S. 500; Schroyer *v.* Richmond, 16 O. S. 466. A court may possess powers of a limited and subordinate character, and yet not be a court of special or limited jurisdiction in the sense that it ought to certify everything precisely. Freeman on Judgments, sec. 122.

"The use of the words 'superior' and 'inferior,' or 'limited' and 'general,' however apt they may have been once, are less so at this time and place, and their duties, in view of our system and mode of procedure, would be better performed by the terms 'courts of record' and 'courts and tribunals not of record.'" Hahn *v.* Kelly, 34 Cal. 391; 94 Am. Dec. 742.

[2] Schroyer *v.* Richmond, *supra*.

true in courts of limited or inferior jurisdiction, conducted in general by men of less experience and less legal learning.[1] The next inquiry is as to the extent to which this rule of presumption existing in favor of the validity of judgments of courts of record goes, is a judgment open to attack, and if so, when and how? These are questions which are next presented to the mind.

A judgment ought to be conclusive of the matters therein adjudged, and when formally pronounced, should have no obstacles placed in the way of its enforcement, nor the subject-matter involved be thereafter made the subject of controversy. To aid in giving this force to the judgment, this rule of presumption in favor of its validity exists. After the machinery of the courts have been invoked and a judgment been pronounced, it should have full force and effect, and not be open to question save for the best of reasons. Certainly not because the court has erred, as there is an adequate remedy in that case.

When jurisdiction has been properly obtained over the subject-matter of a cause, by a court competent to exercise it, its judgment, however erroneous, cannot be questioned in a collateral proceeding. A judgment so rendered is conclusive of the matters found or adjudicated, and can only be set aside or questioned in a direct proceeding instituted for that purpose, namely, a proceeding in error.[2] But while the law is zealous in its regard for judgments, and guards and shields them closely from attacks collaterally or indirectly, it is only done when the jurisdiction of the court has been properly invoked, and this is the purpose and extent of the presumption prevailing in favor of the validity of judgments.

If the party feels himself aggrieved or prejudiced by such judgment, he must resort to some one of the various modes provided by law for appeal, review, rehearing or impeachment.[3] It is said to have become established, by a series of decisions in Ohio, that the finding of a court of general jurisdiction, upon a subject-matter properly before it, shall not be collaterally impeached; but while such finding is unreversed, it is conclusive of the matter so found.[4]

Sec. 80. Courts of general and limited jurisdiction, continued—Presumptions for and against considered with collateral attack.—The rule of presumption prevailing in favor of the judgments

[1] Hahn *v.* Kelly, 34 Cal. 391; 94 Am. Dec. 742.

[2] Fowler *v.* Whiteman, 2 O. S. 270, 286; Spoors *v.* Coen, 44 O. S. 497, 502; Callen *v.* Ellison, 13 O. S. 446; Adams *v.* Jeffries, 12 Oh. 273; Welsh *v.* Childs, 17 O. S. 322; Chapman *v.* Bolton Steel Co., 4 O. C. C. 245; Freeman on Judgments, sec. 135.

[3] Fowler *v.* Whiteman, 2 O. S. 276, 286 and cases cited; Callen *v.* Ellison, 13 O. S. 446, 454.

[4] Fowler *v.* Whiteman, 2 O. S. 270, 286.

of courts of record, and against those not of record, is so closely connected with the doctrine of collateral attack of judgments, that the subject is further considered in that connection. Every judgment depends for its force and validity upon the competency and authority of the court pronouncing it. A judgment may always be assailed on the ground that the court pronouncing it had no jurisdiction over the subject-matter or of the person, even though absolutely conclusive in other particulars.[1]

The inquiry into the jurisdiction may be made whenever the judgment is made the foundation of an action, either in a court of the State in which it was rendered, or of any other State.[2] While it is important to know at this point what comprehends full and complete jurisdiction, inquiry into that question is reserved for another place.[3]

The purpose of the rule of presumption having been explained, namely, guarding and preserving judgments pronounced by courts having proper jurisdiction, from collateral attack, this brings us to the next inquiry, viz.: when and how may the judgment be attacked or questioned, or how will this rule of presumption be made available in withstanding an attack made upon a judgment collaterally?

In making inquiry into the question whether the court pronouncing a judgment had jurisdiction over the subject-matter and of the person, what are we to look to in determining this fact? The record of a judgment is the only evidence of its existence, and hence we must look to it. The record of a court of record, we have seen, imports absolute verity, and the court is presumed to have acted within its jurisdiction, whether the record shows upon its face that it has so acted or not.[4] In the language of Mr. Freeman: "Hence, though the existence of any jurisdictional fact may not be affirmed upon the record, it will be presumed upon collateral attack that the court, if of general jurisdiction, acted correctly and with due authority, and its judgment will be valid, as though every act necessary to jurisdiction affirmatively appeared."[5] In the absence of anything appearing to the contrary, it will be presumed that all orders made in a cause pending in a court of this kind, were rightly and properly made.[6] If the record shows jurisdictional

[1] Pennywit *v.* Foote, 27 O. S. 615; Nye *v.* Stillwell, 12 O. C. C. 40.

[2] Spier *v.* Corll, 33 O. S. 236.

[3] Sec. 87.

[4] *Ante*, sec. 79; Dakin *v.* Hudson, 6 Cow. 221; Cooley's Const. Lim., p. 501.

[5] Freeman on Judgments, sec. 124, p. 210, uote 2, citing numerous decisions, among which are: Reynolds *v.* Stansbury, 20 Ohio, 344; Adams *v.* Jeffries, 12 Ohio, 253.

[6] Johnson *v.* State, 42 O. S. 207, 209. It was presumed that where a criminal cause was continued without disclosing the ground, that continuance was upon sufficient ground, in the absence of anything to the contrary. Johnson *v.* State, 42 O. S. 207. See also Herig *v.* Nou-

facts, inquiry is confined in a collateral attack, to such as appear in the record.[1] And parol evidence will not be admitted to vary the record.[2]

Sec. 81. Presumption as to records further considered.—As heretofore explained,[3] a presumption is indulged in favor of the records of a court of general jurisdiction, that they import absolute verity, and, in the absence of anything appearing therein to the contrary, that all orders made in a cause pending in a court of this kind were rightly and properly made.[4] The decisions of such courts are not of themselves evidence, and their judgments may be looked through for the facts and evidence which are necessary to sustain them.[5] These remarks have a peculiar significance in those cases where it is sought by a *collateral attack* to impeach the judgment of a

garet, 7 O. S. 480; Merchant *v.* North, 10 O. S. 252 Evidence not admissible to contradict the record. Hanes *v.* R. R. Co., 40 O. S. 95. See also Eaton *v.* Longworth, 10 O. S. 20; Knapp *v.* Thomas, 39 O. S. 387. Whether an order of sale of decedent's estate was made in a proper case and upon sufficient proof, cannot be collaterally examined, in case the court making it had jurisdiction. Perry *v.* Clarkson, 16 O. 572.

[1] Callen *v.* Ellison, 13 O. S. 446; Fowler *v.* Whiteman, 2 O. S. 270; Morgan *v.* Burnet, 18 O. 535. See Freeman on Judgments, sec. 131.

[2] Galpin *v.* Page, 18 Wall. 364; Callen *v.* Ellison, 13 O. S. 454 (as to want of proper notice); Railroad *v.* Belle Center, 48 O S. 273, or that publication was not made. Newman *v.* City, 18 O. 323. 330.

[3] *Ante*, sec. 79.

[4] Johnson *v.* State, 42 O. S. 207. 209; Herig *v.* Nougaret, 7 O. S. 480; Merchant *v.* North, 10 O. S. 252. Evidence not admitted to contradict the record. Hanes *v.* R. R. Co., 40 O. S. 95. See Eaton *v.* Longworth, 10 O. S. 20; Knapp *v.* Thomas, 39 O. S. 387. Where there has been no complete record made, the journal and docket entries and all papers properly connected with the case are admissible in evidence. Morgan *v.* Burnet, 18 Ohio, 535; Young *v.* Buckingham, 5 *Id.* 485; Voorhees *v.* Bank, 10 Pet. (U. S. Dist. Ohio) 472; Newman *v.* City, 18 Ohio, 323, 330. But presumptions cannot be received to contradict admitted facts, Wallace *v.* Miner, 6 Ohio, 366.

"It is a general rule that every record must present a case apparently within the jurisdiction of the court, and when the jurisdiction is specially given by statute, and is to be resorted to only on the occurrence of particular facts, those facts must be shown, for however correct it may be to presume jurisdiction, where the want of it does not appear, in cases within the general jurisdiction of the court, yet where the jurisdiction is created by statute and limited to particular cases, of which the court could not take cognizance without the statute, the jurisdiction cannot be presumed. If the facts on which it is made to depend are not averred, the party does not bring himself within the jurisdiction, and he cannot resort to the statute for aid, because his record does not contain the case provided for by the statute.

"The maxim, *est boni judicis ampliare jurisdictionem* (it is the part of a good judge to extend the jurisdiction), does not apply to courts of a limited jurisdiction, much less to cases of which the jurisdiction is wholly dependent on statutory provisions. It would be a *malus judex* who would thus apply it, as it would confound a distinction, without which there can be no limits to the power of courts. It cannot be necessary to advert to the uncertainty and inconvenience that would follow the practice contended for by the defendant." Edmiston *v.* Edmiston, 2 Ohio, 251 (1826).

[5] Sheldon *v.* Newton, 3 O. S. 494, 500.

court.[1] As against such an attack, the judgment of a court of general jurisdiction, particularly, must stand unless the record affirmatively shows a want of jurisdiction.[2] In such cases the record itself is the evidence, and, as before stated, is presumed to speak the truth. Thus, the judgment of a court of competent jurisdiction upon a question directly involved in the suit is conclusive in a second suit between the same parties, depending upon the same question, although the subject-matter be different.[3] And whether an order of sale of a decedent's estate was made in a proper case and upon sufficient proof, cannot be collaterally examined, in case the court making it had jurisdiction.[4]

If the record shows jurisdictional facts, inquiry is confined, in a collateral attack, to such as appear in the record,[5] and parol evidence will not be admitted to vary the record.[6]

Where it affirmatively appears from the record that jurisdiction was not obtained, as where there is a return of summons *not found*, a judgment in such action is void. There can be no intendment or presumption to offset the appearance of a failure of jurisdiction.[7] So where the record contains no finding of facts expressly showing that jurisdiction was regularly acquired, collateral inquiry, it has been held, may be made into the jurisdiction of the court.[8] But if the court, having power to decide as to its own jurisdiction, decides, even erroneously, that it has power to act, its proceedings and judgment cannot be collaterally assailed, but must stand until reversed.[9] If there is an express finding by the court that due service has been made, such finding should prevail over an inference from some other part of the record which fails to show when or how the service was made. If the record shows, however, such a state of facts as to negative the finding of the court, the finding is not good as against even a collateral attack.[10]

[1] See "Collateral Attack," &c., chapter on "Process."

[2] Reynolds *v.* Stansbury, 20 Ohio, 344; Pillsbury *v.* Dugan, 9 *Id.* 117.

[3] Babcock *v.* Camp, 12 O. S. 11, 36; and see Martin *v.* Roney, 41 O. S. 141.

[4] Perry *v.* Clarkson, 16 Ohio, 572. See Ludlow's Lessee *v.* Wade, 5 *Id.* 494; Heirs of Ludlow *v.* Johnson, 3 *Id.* 553.

[5] Callen *v.* Ellison, 13 O. S. 446; Fowler *v.* Whiteman, 2 O. S. 270; Morgan *v.* Burnet, 18 Ohio, 535. See Freeman on Judgments, sec. 131.

[6] Galpin *v.* Page, 18 Wall 364, as to show want of notice; Railroad *v.* Belle Center, 48 O. S. 273; or that order of publication was not made. Newman *v.* City, 18 Ohio, 323, 330.

[7] Callen *v.* Ellison, 13 O. S. 446, 456; Moore *v.* Starks, 1 O. S. 369, 373; Fleischman *v.* Walker, 91 Ill. 318; Dicks *v.* Hatch, 10 Ia. 380.

[8] Scobey *v.* Gano, 35 O. S. 550, 553, and cases.

[9] Fisher *v.* Hepburn, 48 N. Y. 53; Freeman on Judgments, sec. 130; and see Callen *v.* Ellison, *supra*, an excellent decision in point; no matter how erroneously,—Spoors *v.* Coen, 44 O. S. 497, 502; Welsh *v.* Childs, 17 O. S. 319, 322.

[10] Freeman on Judgments, sec. 130.

Sec. 82. Collateral attack—Errors and fraud.—It is a well settled rule that where a court has jurisdiction of the subject-matter and of the persons of the defendants, any judgment rendered therein, however erroneous, is valid and binding upon the parties until reversed in a direct way as provided by law, and no advantage can be taken of such errors upon a collateral attack of such judgment.[1] The legal maxim, *Omnia praesumuntur rite et solemniter esse acta, donec probitur in contrarium*, applies with force to records of all judgments. A solemn judgment of a court of competent jurisdiction is no longer open for controversy, unless it is absolutely void. It cannot be attacked or opened for inquiry into matters which have already been adjudged,[2] except in a regular mode of reinvestigation, on writ of error or appeal.[3] The judgment of a court of competent jurisdiction over the parties and subject, however irregular and summary, cannot be treated as a nullity.[4] Until vacated by appeal, or reversed upon error in a proceeding for that direct purpose, it binds the parties, and cannot be collaterally questioned.[5]

Judgments are not only protected from attacks on account of errors, but the parties thereto cannot in a collateral proceeding impeach them for falsehood or fraud in the judicial tribunal by which it is rendered.[6] "The parties to an action cannot impeach or set at naught the judgment in any collateral proceeding on the ground that it was obtained through fraud or collusion. It is their business to see that it is not so obtained. If, without any fault or neglect of one party, his adversary succeeds, by fraud, in obtaining an inequitable and unauthorized judgment, he must take some proceeding prescribed by law to annul the judgment, and cannot in the absence of such annulment, treat it as invalid."[7]

In *Bank v. Stevens*[8] it was held that where a contract allowing an illegal rate of interest has been allowed to merge

[1] Calkins *v.* Johnston, 20 O. S. 539; Buell *v.* Cross, 4 O. 327, 330; Faran *v.* Robinson, 17 O. S. 242.

[2] Bigelow *v.* Bigelow, 4 Ohio, 138, 149.

[3] Buell *v.* Cross, 4 Ohio, 327, 330.

[4] Douglass *v.* McCoy, 5 Ohio, 525.

[5] Weyer *v.* Zane, 3 Ohio, 306; Adams *v.* Jeffries, 12 Ohio, 272; Douglass *v.* Massie, 16 Ohio, 272; Aubrey *v.* Almy, 4 Ohio St. 325; Moore *v.* Robinson, 6 Oh. St. 305.

[6] Calvin *v.* State, 12 O. S. 60, 70; State *v.* Daily, 14 Ohio, 91, 99. See Faran *v.* Robinson, 17 O. S. 242, 253; O'Connor *v.* State, 18 O. 225.

[7] Freeman on Judgments, secs. 334, 336, 335. There is an expression in State *v.* Daily, 14 Ohio, 99, upon this point which is not perfectly clear: "Judgments may be impeached, it is true, but not for fraud or falsehood, in the judicial tribunal by whom they are rendered; nor as a general rule, in a collateral proceeding. It may be done in a suit by the party injured, or a prosecution against the party through whose means, and by whose procurement a fraudulent judgment is obtained."

[8] 1 O. S. 233.

into a judgment, and proceedings in aid have been resorted to, the parties to it are estopped from averring such illegality in the obligation upon which it was founded.

And where a defendant set up fraud as a ground for setting aside a contract and for cancelling a note not yet due, given in pursuance of said contract, a judgment against him on that point is an effectual estoppel, in a subsequent action on the note, against a plea of mutual mistake by the parties to the note,—as the validity of the contract and note was fully established in the first action.[1] A question of fact having been once tried and adjudicated by a court of competent jurisdiction concludes the parties to it, and it cannot be reopened in a subsequent suit between the same parties.[2] But where such judgment is relied upon to conclude a party in such subsequent proceeding, it must appear from the record of the former suit that the particular controversy sought to be precluded was necessarily determined. But neither the judgment of a court of concurrent or exclusive jurisdiction is evidence of any matter *incidentally* cognizable, nor of any matter to be inferred by argument from the judgment. If the record clearly shows that the judgment could not have been passed without deciding a particular point, it will be considered as having done so for all future actions; but otherwise not.[3]

Sec. 83. Collaterally and directly impeaching judgment—Distinction.—The distinction between cases where the validity of the record of a judgment of a court of general jurisdiction is drawn in question *collaterally*, and those in which such record is *directly* impeached, has always been considered broad and well defined. As against a collateral impeachment, jurisdiction is presumed, *prima facie*, unless the record disproves it, while in the other, if it is denied, its existence must be proved by the record itself. A direct attack is by error or appeal, and a collateral attack is an attack in a new or independent action based upon the judgment.[4] But this view or distinction has, we think, been repudiated, and it has been considered that a direct attack on a judgment is one by which the judgment is directly assailed in some mode authorized by law, as in a new suit thereon by setting up a defense thereto; while a collateral attack is an attempt to defeat the operation of a judgment, in a proceeding where some new right derived from or through the judgment is involved. Williams, J., in Kingsborough *v.* Tousley,[5] speak-

[1] Bell *v.* McColloch, 31 O. S. 397.
[2] Grant *v.* Ramsey, 7 O. S. 158.
[3] Love *v.* Truman, 10 O. S. 45, 54, and cases.
[4] Trimble *v.* Longworth, 13 O. S. 439.
[5] 58 O. S. 458.

ing on this subject, said: "The rules of law applicable to these different methods of attack are based on substantial reasons which serve to make more apparent the real distinction between them. The rule which forbids the collateral impeachment of judgments is founded on those considerations of public policy which require stability of judicial records for the protection of those who acquire rights and property in reliance upon their conclusive effect, and for the peace of society; and, as said by Read, J., in Boswell *v.* Sharp, 15 Ohio, 447, 465, 'seems to have been adopted from right and necessity, to give confidence to the judicial action of the country, and protect those who have made purchases on the faith of judicial sales.' It is obvious these reasons find no just application in an action brought upon the judgment, in which the only relief sought is a new recovery on it, as a debt of record; and where no rights of third persons have intervened, or are involved. Nor, in such case, would there appear to be any substantial ground for denying to the defendant the right to show in defense to the action, that the judgment was rendered without jurisdiction. Such a defense may, we think, be properly regarded as a direct attack on the judgment, and not within the rule or its reason, against collateral impeachments."

In another State it has been held that any attack must be regarded as collateral which is made in any proceeding which is not instituted for the express purpose of annuling, correcting, or modifying a judgment.[1]

Sec. 84. Collateral attack—Divisions of courts as to jurisdiction—And consideration of the record.—It was with some pains and labor that an explanation was made at a former section[2] of the distinction between courts of general and limited jurisdiction, courts of record and not of record, and that the purpose of this division was to aid in determining the verity of judgments, and those sections were prepared before the pronouncement of the decision in the case next referred to. It would seem that, to some extent at least, the holding in the case of Kingsborough *v.* Tousley[3] renders it unnecessary now to consider this distinction and the consequent rule of presumption applied to the record of courts of general jurisdiction.

It has long been the settled rule that if the record of a court of general jurisdiction shows that the court had passed upon the question as to whether service had been made, or upon the sufficiency of service of summons or publication, and that due

[1] Morrill *v.* Morrill, 20 Ore. 96; 23 Am. St. Rep. 95.

[2] *Ante*, secs. 78, 79, 80.

[3] 56 O. S. 450.

notice had been given, that such judgment could not be collaterally impeached or contradicted by evidence that service had not been had.[1] And the rule has been that even where the record is silent—that is, there is no affirmative finding that service has been made—the presumption that a court of general jurisdiction acted with jurisdiction is presumed; that as against a collateral attack it will be presumed that there were facts sufficient to authorize the exercise of jurisdiction.[2] Thus service has been presumed in a collateral proceeding where the record was silent;[3] so where the practice was for the court to make an order of publication for non-resident defendants, such order was presumed to have been made, though the record failed to show that the same was made.[4] Where, however, the record of an inferior court of limited jurisdiction is silent as to the steps taken to secure jurisdiction, the defect is fatal; though if it appears from the record that jurisdiction has regularly attached, silence as to other such steps taken afterward is not necessarily fatal.[5] This applies with equal force to courts of superior, general jurisdiction acting under special laws.

In harmony with this, it has been held that proceedings by county commissioners, *in pursuance of statutes*, though liable to be reviewed and set aside by the court of common pleas, are not void and cannot be collaterally impeached.[6]

In those cases where, the record being silent on the subject of service, jurisdiction has been presumed, it has always been

[1] Trimble *v.* Longworth, 13 O. S. 431, 439; Richards *v.* Skiff, 8 O. S. 586; Boswell *v.* Sharp, 15 Ohio, 447; Buchanan *v.* Roy, 2 O. S. 251; Fowler *v.* Whiteman, 2 O. S. 270; Freeman on Judgments, secs. 130, 132, 275; Rhodes *v.* Gunn, 35 O. S. 387.

[2] Moore *v.* Starks, 1 O. S. 372, 373; Glover *v.* Ruffin, 6 Ohio, 255; Smith *v.* Pratt, 13 Ohio, 548, 550; Adams *v.* Jeffries, 12 Ohio, 253, 271. Mr. Freeman says: "The preponderance of the decisions upon this question supports the doctrine that it is a matter of no consequence whether the jurisdiction of the court affirmatively appears upon the judgment roll or not; for if it does not, it will be conclusively presumed." Freeman on Judgments, sec. 132, citing many authorities. Reynolds *v.* Stansbury, 20 Ohio, 344, 354; Van Fleet's Coll. Att., secs. 805, 833.

[3] Morgan *v.* Burnet, 18 Ohio, 535, 546; and see Rhodes *v.* Gunn, 35 O. S. 387; Moore *v.* Starks, 1 O. S. 369; Richards *v.* Skiff, 8 O. S. 586, 589; *Contra*, Pelton *v.* Platner, 13 Ohio, 209, 219; Buchanan *v.* Roy, 2 O. S. 252, 266.

[4] Newman *v.* City, 18 Ohio, 323. Where the record showed a petition to sell land, appointment of appraisers, an account of sale, but no order to sell nor of confirmation, judgment held void in Goforth *v.* Longworth, 4 Ohio, 129, and see Newcomb *v.* Smith, 5 *Id.* 447, 451. But it seems that the order should have been presumed from the later proceedings,—Van Fleet Coll. Att., sec. 833.

Where record is silent as to the steps taken to secure jurisdiction, it will be presumed,—Hawe's Jurisd. of Courts, sec. 259, and cases. See Paine *v.* Moreland, 15 Ohio, 435.

[5] Van Fleet's Coll. Att., sec. 805. See Beebe *v.* Scheidt, 13 O. S. 406, 415; McClelland *v.* Miller, 28 *Id.* 488, 500; State *v.* Daily, 14 Ohio, 91, 98; Lessee *v.* Eyster, 7 *Id.* 257, 259; Dabney *v.* Manning, 3 *Id.* 321; Root *v.* Davis, 51 O. S. 29, 38; Fairchild *v.* Keith, 29 O. S. 156; Adams *v.* Jeffries, 12 Ohio, 253.

[6] Blanchard *v.* Bissell, 11 O. S. 96.

held that it was competent for the defendant to rebut the presumption of service by affirmative proof that he had not been served, and *then* the record becomes a nullity, and can be collaterally impeached.[1] Every judgment depends for its force and validity upon the competency and authority of the tribunal which pronounces it, and may be assailed by showing a want or failure of jurisdiction over the subject-matter or the person, though absolutely conclusive in other particulars.[2] The rule now is, that, whether there be a showing of facts as to service, or whether the record be silent, the defensemay be made, *dehors* the record, that the service was not made.[3]

But the old rules and cases are given somewhat fully in the next section.

Sec. 85. Collateral attack, continued — Jurisdiction. — The general good clearly requires, and the rule has heretofore been established, that domestic judgments of courts of general jurisdiction cannot be attacked collaterally; that if the record of such judgment shows that proper notice has been given, that the record cannot be contradicted by proof, as such records are presumed to be correct.[4] "Courts of common pleas being courts of general jurisdiction, as to them, the existence of jurisdiction will be presumed, their records being silent upon the subject, whenever an attempt is made to impeach their judgments collaterally."[5] Where the records of such courts show jurisdiction, or disclose that the court found the facts on which jurisdiction rests, as that proper service was had, and being shown by a record imparting absolute verity, the judgment or order of the court cannot be collaterally impeached.[6] Principles of policy support the rule that a judgment cannot be collaterally impeached by showing that no service has been made, while principles of natural justice require that the record of a judgment shall absolutely speak the truth. Gholson, J., in Callen *v.* Ellison,[7] said: "As to the judgments of general jurisdiction, . . . the decisions of this State, though perhaps not entirely uniform or consistent, do undoubtedly show a strong inclination to sustain such judgments against indirect or collateral attacks on their validity and effect. It appears to have been thought that natural justice is satisfied, when notice is required, and an impartial tribunal established

[1] Moore *v.* Starks, 1 O. S. 369, 373.

[2] Pennywit *v.* Foote, 27 O. S. 615; Nye *v.* Stillwell, 12 O. C. C. 40.

[3] Kingsborough *v.* Tousley, 56 O. S. 458.

[4] Coit *v.* Haven, 30 Conn. 199; 79 Am. Dec. 244.

[5] Morgan *v.* Burnet, 18 Oh. 535; Freeman on Judgments, sec. 131.

[6] Richards *v.* Skiff, 8 O. S. 586; Hammond *v.* Davenport, 16 O. S. 182.

[7] 13 O. S. 455.

to ascertain and determine whether it has been given. Nor can it be properly said that such a tribunal has jurisdiction because it has so decided. Its decision is binding because it was authorized to make it, and because public policy, and the respect due to the sovereignty it represents, at least in tribunals acting under the same sovereignty, requires that decision should be regarded, while it remains unimpeached and unreversed. We feel inclined to go as far in sustaining the validity and effect of the judgments of courts of general jurisdiction as our predecessors have gone, and no disposition to permit an indirect attack upon them in any case not authorized by former decisions."

The rule as formerly expressed is as follows: "It has become established, by a series of decisions in Ohio, that the finding of a court of general jurisdiction upon a subject-matter properly before it, shall not be collaterally impeached, but whilst such finding is unreversed, it is conclusive of the matter so found. A party to such finding or decree conceiving himself prejudiced thereby, must resort to some of the various modes provided by the law, for appeal, review, rehearing, or impeachment."[1] On the other hand, it has been decided that where it affirmatively appears in the record that the defendant was not served with process, or otherwise legally notified, the judgment is void.[2] As heretofore explained, courts of record in Ohio, and not necessarily courts of general jurisdiction, are presumed to have acted within their jurisdiction.

Probate courts are courts of record, whose records import absolute verity, and are competent to decide on their own jurisdiction and exercise it without setting forth the facts, and the record showing nothing to the contrary, it will be conclusively presumed, in all collateral proceedings, that the judgment or order was made upon full proof of all the facts necessary to authorize it.[3] And it has been held that a finding by such court that service upon the defendant is complete cannot be collaterally impeached by showing that service was improperly made.[4]

[1] Fowler *v.* Whiteman, 2 O. S. 286; Boswell *v.* Sharp, 15 O. 466; Robb *v.* Lessee of Irwin, 15 O. 689; Newman *v.* Cincinnati, 18 O. 330; Morgan *v.* Burnet, 18 O. 546; Trimble *v.* Longworth, 13 O. S. 431; Richards *v.* Skiff, 8 O. S. 586; Buchanan *v.* Roy, 2 O. S 251.

[2] Hammond *v.* Davenport, 16 O. S. 182; Moore *v.* Starks, 1 O. S. 369. While it is well settled that a judgment rendered by a court of general jurisdiction cannot be assailed in a collateral proceeding where the court has jurisdiction of the person and the subject-matter of the action, it *is equally well settled that when it appears from the face* of the record that the court did not have jurisdiction of the person or subject-matter, that such an irregularity can be inquired into, and in all such cases the judgment rendered is not only erroneous, but void, and of no effect. Chapman *v.* Bolton Steel Co., 4 O.C.C. 242, 245.

[3] Shroyer *v.* Richmond, 16 O. S. 455; Railroad Co. *v.* Belle Center, 48 O. S. 273.

[4] Railroad Co. *v.* Belle Center, 48 O. S. 273.

So far, we have been speaking of judgments of courts of general or superior jurisdiction, or, as the division is now made, courts of record, in whose favor the law indulges in presumptions as to the validity of their judgments, and all the cases thus far cited have been with respect to such courts. And we have seen that the judgments of such courts cannot be collaterally impeached by showing facts *dehors* the record, whether the record is silent or whether it discloses a finding in favor of its jurisdiction.

We come now to the court which is in the class of inferior jurisdiction and not of record. It will be remembered that as to courts of record, it need not affirmatively appear that the court acted within its jurisdiction, as that is presumed. But as to justice's courts, they have only such jurisdiction as is conferred by statute, and it must appear by the record of a judgment by such court that the matter adjudicated was within the jurisdiction so conferred, and also that the court had acquired jurisdiction over the person; that if this fairly appears upon the record, the judgment of a justice of the peace is as impregnable against collateral attack as the judgment of any other court in the State, and is no different from a judgment of a court of common pleas.[1]

The doctrine most recently announced by the supreme court in Kingsborough *v.* Tousley[2] is regarded as an innovation, although the court disclaims any intention of sustaining a collateral attack. Suit was instituted in the court of common pleas, on a judgment recovered before a justice of the peace. A defense was made that the defendant was not served with the process and that the court had no jurisdiction to render the judgment. The court, considering that such a defense was not within the rule forbidding the collateral impeachment of a judgment, but regarding it as a direct attack, made no reference to the distinctions heretofore observed between courts of record and not of record. Conservative lawyers are slow to abolish or abandon old rules and distinctions, but feel better satisfied if courts show that they have paid some attention to former decisions and disclose an intention to reverse them. In this case, new principles are broadly asserted in the syllabus, which is regarded as the law of the case, upon a state of facts as disclosed in the report, which makes it wholly at variance with all former decisions. As a matter of fact, the syllabus of the case is broader than the facts in the case really warrant, and should not therefore be regarded as the law. The syllabus refers to all judgments, whether domestic or for-

[1] McCurdy *v.* Baughman, 43 O. S. 78, 81; State *v.* Daily, 14 O. 91; Adair *v.* Rogers, W. 428; Stockwell *v.* Coleman, 10 O. S. 34, 40. A record of a justice must show jurisdiction; the jurisdiction of that court is inferior and limited, and to support a judgment the record must show that it obtained jurisdiction over the person of the defendant. Robbins *v.* Clemmens, 41 O. S. 285.

[2] 56 O. S. 450.

eign, those rendered by courts of general as well as of inferior jurisdiction, whereas the case was only upon a judgment rendered by a magistrate, and the decision is made to apply to *all* judgments. Twelve years before this decision, the same court, composed of different judges, had decided that when the record of a judgment of a justice shows that the court had jurisdiction of the person, that it is not subject to contradiction. But now this case announces a sweeping rule, which makes it unnecessary to observe the record at all in considering the verity of the judgments. Notwithstanding the broad rule announced in the syllabus, I am inclined to the belief that it should be confined to the facts in the case, viz: judgments of justice's court. With these comments the following quotations are made:

"In an action on a personal judgment, whether rendered by a court in this State or elsewhere, it is competent to plead and prove in defense, though it be in contradiction of the record, that the defendant was not served with process, nor jurisdiction of his person otherwise obtained by the court rendering the judgment.

"Such a defense is not within the rule which forbids collateral impeachment of judgments, but is in the nature of a direct attack upon the judgment.

"The wisdom of this salutary rule cannot be questioned, for as long ago as Judge Gholson's time, it was with some difficulty that the court adhered to the former decisions of the court which required them to close their eyes to natural justice and truth, when a judgment of a court of general jurisdiction purported upon its face to have had jurisdiction of the person, when in fact it had not, and the record stated a falsehood. The rule of verity did not permit them to entertain a defense which would contradict such a judgment. But natural justice would require that rules of procedure be so flexible that absolute justice be done, and that no record shall state a falsehood, and that no judgment shall stand which is not within the jurisdiction of the court. As to such courts, the underlying facts which will actually show whether the court acted within its jurisdiction are not to be stated on the record, but only the finding of the court from those facts so that it was not possible for the truth to be stated as in the case of justice's courts, where the facts showing the jurisdiction, and not the conclusion, are to be stated, so that it is apparent from the record whether there was a want of jurisdiction or defective jurisdiction. But it was also possible for the record of a judgment of a justice to misstate the facts conferring jurisdiction, and the old rules even made it impossible to contradict such a record."

It is now possible to attack any judgment anywhere for want of jurisdiction, according to this doctrine.

Sec. 86. Effect of acts without jurisdiction.—There is a distinction between cases where the validity of the record of a court of general jurisdiction is drawn in question *collaterally*, and those in which such record is *directly* impeached by petition in error or bill of review. In the one case, jurisdiction is presumed *prima facie* unless the record itself disproves it; while in the other, if it is denied, its existence must be proved by the record itself.[1] The line which separates *error in judgment* from the *usurpation of power* is very definite, and is precisely that which denotes the cases where a judgment or decree is reversible only by an appellate court, or may be decreed a nullity collaterally, when it is offered in evidence in the matter adjudicated, or purporting to have been so. In the one case, it is a record imputing absolute verity; in the other, mere waste of paper.[2] As stated by the supreme court in *Paine v. Moorcland*,[3] there is a distinction between *want* of jurisdiction and the wrongful exercise thereof. "In the first case, all acts of the court are void; in the latter, voidable only. A court, then, may act: 1. Without power or jurisdiction. 2. Having power or jurisdiction, may exercise it wrongfully; or 3. Irregularly. In the first instance, the act of the court is wholly void, and is as though it had not been done; the second is wrong, and must be reversed on error; the third is irregular, and must be corrected by motion," it being rightful, but an irregular exercise of jurisdiction.[4] Again, in *Sheldon v. Newton*,[5] the court say: If the court had jurisdiction of the subject-matter and the parties, it is altogether immaterial how grossly irregular or manifestly erroneous its proceedings may have been; its final order cannot be regarded as a nullity, and cannot, therefore, be collaterally impeached. On the other hand, if it proceeded without jurisdiction, it is equally unimportant how technically correct, and precisely certain in point of form, its record may appear; its judgment is void to every intent, and for every purpose, and must be so declared by every court in which it is presented.[6]

[1] Trimble *v.* Longworth, 13 O. S. 431.

[2] Reynolds *v.* Stansbury, 20 Ohio, 344, 353.

[3] 15 Ohio, 435, 445.

[4] Want of jurisdiction of the cause of action as much as want of jurisdiction of the person will render a judgment or decree void. Buchanan *v.* Roy's Lessee, 2 O. S. 251, 267; Dayton, &c., R. R. Co., *v.* Marshall, 11 O. S. 497; Gilliland *v.* Sellers, 2 O. S. 223; Hollister *v.* Dillon, 4 O. 200, 204; Harrington *v.* Heath, 15 *Id.* 483, 487; Evans *v.* Iles, 7 O. S. 233; 2 O. S. 251; 4 W. L. M. 32.

[5] 3 O. S. 49.

[6] The judgment of a court cannot be collaterally inquired into because of any supposed irregularity in such proceeding where such irregularity does not affect the jurisdiction of the court. English *v.* Woodman, 40 Kan. 412.

The settled rule of the law is that jurisdiction, having attached in the original case, everything done within the limits of that jurisdiction, when collaterally questioned, is held to be conclusive of the rights of the parties (Cornett *v.* Williams, 20 Wall. 226, 249), unless impeached for fraud.

A personal judgment rendered against one over whom the court has no jurisdiction is wholly void.[1] Where the court has no jurisdiction of a cause, it can render no judgment therein for costs, but costs of proceedings in error to reverse a judgment rendered without jurisdiction must be adjudged to the plaintiff in error.[2]

Sec. 87. General essentials of jurisdiction.—Before the power to hear and determine can be affirmed to exist, it must be made to appear that the law has given a tribunal capacity to entertain the complaint against the person or thing sought to be charged or affected; that such complaint has actually been preferred; that such person or thing has been properly brought before the court to answer the charge therein contained; when these appear, the jurisdiction has attached, the right to hear and determine is perfect, and the decision of every question thereafter arising is but the exercise of the jurisdiction thus conferred; and whether determined rightfully or wrongfully, correctly or erroneously, is alike immaterial to the validity, force and effect of the final judgment when brought collaterally in question.[3]

Sec. 88. Pleadings must show jurisdiction.—It is not necessary that the statement of the claim should be so perfect, in form and substance, as to be free from objection on demurrer, to confer jurisdiction upon the court to hear and determine it.[4] If a case be imperfectly presented, and can be perfected by amendment, the judgment will not be considered a nullity. But, in order that a party may be permitted to amend, there must be something to amend by.[5] So, unless a case is presented that could be amended, there is no case upon which a judgment can be rendered. A judgment rendered where no case has been stated is as much a judgment upon a case *coram non judice*, whatever may be the jurisdiction of the court rendering it, as a judgment

Judgment for costs when court without jurisdiction.—A court having no jurisdiction cannot render judgment for costs. Burke *v.* Jackson, 22 O. S. 268; Rothwell *v.* Winterstein, 42 O. S. 24. See R. S., sec. 5348 *et seq.*

But when a court *reverses* a judgment of a lower court for want of jurisdiction in the latter, it must render judgment for costs in favor of plaintiff in error. Burke *v.* Jackson, *supra;* Moore *v.* Boyer, 42 O. S. 312. See 3 Ohio, 380; 5 *Id.* 45, 47.

Rule otherwise, where a court *dismisses* a cause for want of jurisdiction: Can only strike the case from its docket. Norton *v.* McCleary, 8 O. S. 205. See 22 O. S. 268; 19 O. S. 427; 13 O. S. 563; 15 Ohio, 483; 4 *Id.* 200; 2 *Id.* 254; 2 Bull. 241.

[1] Spier *v.* Corll, 33 O. S. 236.

[2] Burke *v.* Jackson, 22 O. S. 268; Moore *v.* Boyer, 42 O. S. 312; Norton *v.* McLeary, 8 O. S. 205.

[3] Chapman *v.* Belton Steel Co., 4 O. C. C. 245; Sheldon *v.* Newton, 3 O. S. 499; U. S. *v.* Arredondo, 6 Pet. 709; Rhode Island *v.* Massachusetts, 12 Pet. 718.

[4] Spoors *v.* Coen, 44 O. S. 503, citing Buchanan *v.* Roy, 2 O. S. 251.

[5] Spoors *v.* Coen, 44 O. S. 503, citing Shamokin Bank *v.* Street, 16 O. S. 10.

upon the case, however perfectly stated, before a court not clothed with jurisdiction to hear and determine it.[1]

Sec. 89. Character of service essential to clothe with jurisdiction.—Jurisdiction cannot be properly obtained or invoked unless service of process is regularly and legally made, or the parties by their acts waive the irregularities and submit themselves to the jurisdiction of the court.[2] Where the record of a judgment of a court of inferior jurisdiction, in whose favor no presumptions are indulged, shows a want of service, and does not otherwise show that jurisdiction of the defendant was obtained, the same is a nullity and may be attacked collaterally.[3] Where the record shows that certain steps were taken to procure jurisdiction, and the law does not consider these steps sufficient, the judgment will be regarded as void for want of jurisdiction.[4] It is competent, whether it be a judgment of the State or of another State, to plead and prove in defense, though in contradiction of the record, that the defendant was not served with process, and that jurisdiction of his person was not otherwise obtained.[5]

Sec. 90. Proper indorsement on summons necessary.—The court does not acquire jurisdiction to render judgment by default where the summons does not have the amount claimed by plaintiff against the defendant indorsed thereon, in actions for the recovery of money[6] where appearance is not entered.[7]

Sec. 91. Essentials to jurisdiction—Territorial limitations.—It is fundamental that the jurisdiction of a court cannot extend beyond the limits of its own territory. The territorial limits within which a court may exercise its jurisdiction is prescribed by statute, and is limited to counties or districts, and of course is confined within the State. As to matters which are local, such as the recovery of land, partition of realty, and sales of land under a lien, there can be no extra-territorial exercise of jurisdiction. But as to matters of a transitory nature which follow the person, and are of a personal nature, the courts may entertain jurisdiction, when properly invoked, which may be binding upon the parties wherever they may go, and whenever they may be called in question in other States.

For example, courts in the exercise of chancery power have jurisdiction to enforce a trust and compel the specific perform-

[1] Spoors *v.* Coen, 44 O. S. 503; 47 O. S. 207.

[2] Pearson *v.* Pierce, 40 O. S. 231.

[3] Robbins *v.* Clemmens, 41 O. S. 85.

[4] *Id.* Freeman on Judgments, sec. 125.

[5] Kingsborough *v.* Tousley, 56 O. S. 450.

[6] Kinkead's Code Plg., sec. 461 (2d ed.).

[7] Finckh *v.* Evers, 25 O. S. 82; Russell *v.* Moody, 40 O. S. 603.

ance of a contract in relation to lands in another State, after having obtained jurisdiction of the persons of those upon whom the obligation rests.[1] But the decree in such cases, or the deed of a master executed in pursuance thereof, cannot operate to transfer the title to such lands, though it is *binding on the consciences* of the parties and may form the basis of an action for the possession of the land, brought in the State where the land is situate.[2]

So a court of this State may by injunction prevent a citizen of this State from bringing attachment proceedings in another State, to subject to the payment of his claim against another citizen of this State, the earnings of the latter, which by the laws of this State are exempt from being applied to the payment of such claim.[3] To attach the credits of a non-resident debtor by simple service of garnishment on his debtor, without service on the non-resident would be giving the laws extra-territorial effect.[4]

Sec. 92. Jurisdiction of person in county other than his residence.—A person cannot be required to appear and answer to an action brought against him in a county other than his residence. But in certain cases when the action is *rightly* brought in any county, the code allows summons to be issued to any other county against one or more defendants.[5] But this cannot be done unless that action be rightly brought in such other county; and if not so brought, the court does not acquire jurisdiction of the subject-matter of the action nor of the person.[6] The code provides[7] that certain actions must be brought in the county where *a* defendant resides or is summoned, in which case summons may issue to any county, to other defendants. But the word "defendant" does not mean a nominal defendant merely, but one having a real and substantial interest adverse to the plaintiff.[8] When suit is brought in one of the counties in which a municipality is situated, it is properly brought, and summons may be issued to any other county, against one or more defendants. Where the territory comprising such corporation is located in two counties, partly in each, the corporation has a *situs* in both, and suit may be brought in either at the election of the plaintiff.[9] Thus, where non-residents of the county where suit is brought are sued as joint contractors with a resident of such county, and service of process is made on them only in the

[1] Burnley *v.* Stevenson, 24 O. S. 474, and cases cited; Penn *v.* Hayward, 14 O. S. 302; R. S., sec. 5021

[2] *Id.* See Henry *v.* Doctor, 9 Ohio, 51; Blake *v.* Davis, 20 *Id.* 236, 245.

[3] Snook *v.* Snetzer, 25 O. S. 516.

[4] Root *v.* Davis, 51 O. S. 29, 36.

[5] R. S., sec. 5035.

[6] Chapman *v.* Bolton Steel Co., 4 O. C. C. 242, 245.

[7] R. S., sec. 5028.

[8] Allen *v.* Miller, 11 O. S. 374, 378; 41 O. S. 317.

[9] Fox *v.* Fostoria, 14 C. C. 471.

county or counties of their residence, the jurisdiction of the court in the action will depend upon whether the defendants are in fact joint contractors. If it so happen that the resident is not liable, or that the non-residents are not liable, the court must dismiss the action as to the defendants residing and served outside of the county.[1]

Where the allegations of the petition upon its face make a case in which all of the defendants are rightfully joined, and service is made on one or more in the county where the suit is brought, and on the others in another county, the question of jurisdiction of the court over the persons of the defendants served in such other county must be determined from the allegations of the petition, and must be raised by answer.[2]

Sec. 93. Consent and waiver.—Where the court has jurisdiction of the subject-matter, appearance and consent may confer jurisdiction over the person. The rule in such cases is, that if the defendant is exempt from being required to submit to the jurisdiction of the court, the exemption is a personal privilege which he may waive.[3] And advantage of such personal privilege or exemption must be taken by an objection interposed before pleading to the merits.[4] It is a sound principle that where a party voluntarily appears to the merits of any controversy, or makes any other appearance to an action which recognizes the general jurisdiction of the court, he thereby waives all irregularity which may have intervened in getting him into court.[5]

[1] Dunn *v.* Hazlett, 4 O. S. 435; Thompson *v.* Massie, 41 O. S. 317. See also Allen *v.* Miller, 11 O. S. 374.

A case will be dismissed when it appears that the parties thereto have been improperly or collusively made or joined for the purpose of creating a case cognizable by the court. Williams *v.* Nottawa, 104 U. S. 209.

[2] Drea *v.* Carrington, 32 O. S. 595; Kehnast *v.* Daum, 4 O. N. P. 366.

[3] Steamboat *v.* Long, 18 O. S. 521, 534.

[4] Thompson *v.* Morton, 2 O. S. 26.

[5] Branner *v.* Chapman, 11 Kan. 118; Carver *v.* Shelly, 17 Kan. 472; Bury *v.* Conklin, 23 Kan. 460; Bentz *v.* Eubanks, 32 Kan. 323.

If a defendant, whose residence is out of the State, be sued with process while temporarily present within the State, such process will confer complete jurisdiction over his person in our courts. His bodily presence is equivalent for such purpose. Alley *v.* Caspari, 80 Me. 234.

Story, in his Conflict of Laws, sec. 581, founds this jurisdiction of courts on the axiom that all persons who are found in the limits of a government, whether the residence be permanent or temporary, are to be deemed subjects thereof. Wharton takes the same view, —Wharton Con. Laws, sec. 742.

Where there is no proper service in a cause before a magistrate, but the defendant, before the trial of the action, files with the justice a bill of particulars, this constitutes a voluntary appearance. Godfred *v.* Godfred, 30 O. S. 53.

Appearance—By motion to question jurisdiction—Elliott *v.* Lawhead, 43 O. S. 171; Handy *v.* Ins. Co., 37 O. S. 366; Maholm *v.* Marshall, 29 O. S. 611.

Appearance—Appellate jurisdiction.—It is well settled in this State that though the justice may have had no jurisdiction, yet, if the case be appealed to the common pleas, and the parties there proceed to trial upon the merits, it is considered as waived by

But if jurisdiction of the subject-matter is wanting, it cannot be conferred by consent or by agreement;[1] and where the record shows a want of jurisdiction of the subject-matter, a failure to plead to the jurisdiction of the court is not a waiver of the objection.[2] As to objections to the jurisdiction of the court, the rule may be summed up thus: "An obligation to jurisdiction over the subject-matter is a waiver of jurisdiction of the person; while an objection to the jurisdiction of the person is a waiver of nothing."[3] But it must be borne in mind that an actual want of jurisdiction of the subject-matter can be supplied only by constitutional provision, or by legislative enactment, and in the latter case, only by enactments that are constitutional.[4] Commenting upon the subject of consent in its relation to jurisdiction, the supreme court, in a comparatively

failure to object at the proper time. Harrington *v.* J. Heath, 15 O. 483; Bisher *v.* D. Richards, 9 O. S. 495; Wood *v.* O'Ferrall, 19 O. S. 427; Thomas *v.* Pennrich, 28 O. S. 57.

Appearance.—Where parties appear before a court (J. P.), agree upon a day for trial, and the defendant demands a jury, which is awarded him, he thereby waives all objections to the jurisdiction of the court. Railroad *v.* Fleming, 30 O. S. 480.

But where in such case the parties, instead of taking advantage of the want of jurisdiction, file motions raising questions as to the sufficiency of the petition on appeal, and invoke the ruling of the court thereon, the defendant impliedly waives the issuing and service of summons, and submits to the jurisdiction of the court. O'Neal *v.* Blessing, 34 O. S. 33, 37.

A railroad company, like a natural person, submits itself to the jurisdiction of the court by appearing for any other purpose than to object to such jurisdiction. R. R. Co. *v.* Morey, 47 O. S. 207.

A person will submit himself to the jurisdiction of the court by filing any sort of a pleading which will question the merits of the case. He may appear for the sole purpose of questioning the jurisdiction, appearing for that purpose only, and not attempting to question the merits. Kinkead's Pldg., secs. 225-6; Kinsey *v.* Iron Works, 4 O. N. P. 293. A special appearance to contest the jurisdiction of the court does not give the court jurisdiction of the defendant. Green *v.* Green, 42 Kan. 654; Branner *v.* Chapman, 11 Kan. 118.

If the appearance by a party may be called general or special—general when for the purposes of the case generally, and special when for the purpose of questioning the jurisdiction only. If an appearance, though called special, be upon other than jurisdictional grounds, it will be a general appearance. Burdette *v.* Corgan, 26 Kan. 104; Green *v.* Green, 42 Kan. 656.

If a motion merely contests the service only, and does not go beyond jurisdictional grounds, it is a special or limited appearance. *Id.*

An appearance by attorneys only by motion to set aside an irregular service, is a special appearance and does not submit one to the jurisdiction. Simock *v.* Bank, 14 Kan. 529.

[1] Rohn *v.* Dunbar, 13 O. S. 572; Dayton & C. R. R. Co. *v.* Marshall, 11 O. S., 497, 501. See 3 W L. M. 611; 4 *Id.* 32; Cerro Gordo Co *v.* Wright Co., 59 Ia. 485; Hoagland *v.* Creed, 81 Ill. 506; Dodson *v.* Scroggs, 47 Mo. 286; Allen *v.* Miller, 11 O. S. 374.

It is competent for a court of error to reverse a judgment void for want of jurisdiction in the lower court, although the plaintiff in error voluntarily resorted to such court. Evans *v.* Iles, 7 O S. 234.

If not given by statute to a justice of the peace, it cannot be conferred by warrant of attorney. McCleary *v.* McLain, 2 O. S. 368. See Gilliland *v.* Sellers. *Id.* 223.

[2] Hamilton *v.* Merrill, 37 O. S. 682; The Gen. Buell *v.* Long, 18 O. S. 521, 534.

[3] Smith *v.* Hoover, 39 O. S. 249, 258.

[4] Freeman on Judgments, sec. 120.

recent decision, say: If jurisdiction be lost by statutory limitation, it cannot be conferred by consent of the parties nor (in the absence of facts which should estop them to deny the jurisdiction of the court) by voluntary appearance. But when both parties appear in a court of error in the mistaken belief that the proceeding has been duly commenced and is actually pending, the defendant in error is estopped after appearing and submitting the case upon oral argument or printed brief, to question the jurisdiction over the person or subject-matter on the ground of the failure to issue and serve a summons in error.[1] While an objection to the jurisdiction of a court of equity, on the ground that there is an adequate remedy at law, might be sustained if made by demurrer or answer before a hearing on the merits,[2] yet such objection is too late when made on appeal to the circuit court after being tried in a court of common pleas.[3] On the other hand, the decisions have established the rule that where the ground of objection to the jurisdiction appears in the record, objection having been made at the earliest possible opportunity, and the party has resisted the jurisdiction as far as he was permitted, his submitting to try the cause on its merits does not preclude him from taking the exception in the revising tribunal.[4] But he must take the first opportunity to make his objection in the appellate court, or the privilege is waived.

Sec. 94. Jurisdiction of the subject-matter.—When we speak of the jurisdiction of the subject-matter, we have reference to the nature of the cause of action and of the relief sought. Jurisdiction of the subject-matter or cause of action, is a condition precedent to the acquisition of jurisdiction of the person;[5] and if it be not within the scope of the powers of the court, the action may be dismissed when this fact is shown.[6] A judgment upon a subject-matter not within the jurisdiction of the court is a nullity, and may be impeached under any circumstances.[7]

Jurisdiction of the cause arises out of some right or claim to a thing within the territorial jurisdiction of the court, or out of some controversy between the parties, involving the claim of one or the other for the performance of some act, as the payment of money, the transfer of property, or the doing or omission or for the forbearance to do some act, which controversy the court is invested with authority to decide.[8]

[1] King *v.* Penn, 43 O. S. 57. The petition in error was filed, but summons in error not issued or served within the statutory time.

[2] See Buchanan *v.* Roy, 2 O. S. 251.

[3] Culver *v.* Rodgers, 33 O. S. 537.

[4] Torbet *v.* Coffin, 6 Ohio, 33, 34.

[5] Freeman on Judgments, sec. 119.

[6] Thompson *v.* Steamboat, 2 O. S. 26.

[7] Gilliland *v.* Sellers, 2 O. S. 223.

[8] Callen *v.* Ellison, 13 O. S. 446, 453.

Sec. 95. Jurisdiction of subject-matter, continued—Over property within territorial jurisdiction of court.—By property is understood to be the right and interest which a man has in lands and chattels to the exclusion of all others. It comprehends such property as is perceptible to the senses, as lands, houses, goods, merchandise, and the like; or it may include legal rights, choses in action, easements, and the like.

To determine what under this classification may be within the territorial jurisdiction of the court, recourse must be had to the code with reference to the venue of actions.

All actions for the recovery of real property, or of an estate or interest therein, or for the partition of real property, or for the sale of real property under a mortgage, lien, or other incumbrance or charge, must be brought in the county where the subject of the action is situate.[1] Lands and other property situate in another State or country are not within the jurisdiction of the courts of this State, and cannot be directly affected by their judgments.[2] It is also provided that when the property is situate in more than one county, the action may be brought in either; but in actions for the recovery of real property, this can only be done when the property is an entire tract.[3] The venue of actions concerning lands, and in fact the venue of all actions, has been discussed by the author in his work on Pleading, and will not be treated further here.[4] Actions for the purchase price of real property, when founded on the contract of sale, are within the exclusive jurisdiction of the common pleas court, being actions "on contracts for real estate."[5]

Sec. 96. Same, continued—Personal property.—Personal property has no locality. That is, it is subject to that law which governs the person of the owner, both with respect to the disposition of it, and with respect to the transmission of it, either by succession, or by the act of the party. It follows the law of the person. If he dies, it is not the law of the country in which the property is, but the law of the country of which he is a subject, that will regulate the succession.[6] So it has been considered that in the foreclosure of a chattel mortgage, where the court has jurisdiction of the parties in interest, it is not necessary to a decree of foreclosure that the mortgaged property should be within the territorial jurisdiction of the court. This was upon the theory that the nature of the suit

[1] R. S., sec. 5019.
[2] Freeman on Judgments, sec. 120.
[3] R. S., sec. 5020.
[4] See chapter on Venue of Actions.
[5] Crafts *v.* Prior, 51 O. S. 21.
[6] Swearingen *v.* Morris, 14 O. S. 424.

was that of a proceeding *in personam.*[1] An action for the recovery of the property, as by replevin, must be considered as a proceeding *in rem*, and must be brought where the same is situate, as it is necessary, to clothe the court with jurisdiction to determine the ownership and enforce its decree, that the property be actually seized.

And so where it is sought to take advantage of the auxiliary remedy of attachment or garnishment, the property must be in the jurisdiction of the court, so that it can be laid hold of under the appropriate writs. A court does not acquire jurisdiction over property by attachment unless the officer making the levy of the writ actually takes the property into his custody, so that it may be held subject to the order of the court from which the writ is issued. If not so taken, the property is not within the jurisdiction of the court, and may be taken in execution or attachment by any other creditor.[2]

Sec. 97. Same, continued—Debt or obligation.—The law of the *locus rei sitae* determines the right of courts to assume jurisdiction over a debt or obligation rather than the domicile of the owner or creditor, so that debts may be said to have a locality distinct and independent from the creditor or owner who resides in another place, and the most generally accepted view is that the *situs* of such an obligation is where the debtor resides, so that the courts where the debtor resides may exercise jurisdiction over the matter, by attachment process, although the evidence of the debt may be in another State. But the property in the debt is where the debtor resides, and the evidence of such debt, as a note, is not the property.[3]

Sec. 98. Jurisdiction determined by amount.—The statutes in Ohio[4] provide that the court of common pleas shall have original jurisdiction in all civil cases where the sum or matter in dispute exceeds one hundred dollars, which sum is the limit of the *exclusive* jurisdiction of a justice of the peace. It has been decided that it is the amount *claimed* in the petition that determines the jurisdiction of this court, even though there may be a verdict for a less amount.[5] A party who is necessarily

[1] Means *v.* Worthington, 22 O. S. 622; 2 Spence Eq. Jur. 6, 7; Booth *v.* Clark, 17 How. 332.

[2] Root *v.* Railroad Co., 45 O. S. 222.

[3] Wilson *v.* Gifford, 12 O. C. C. 597, 603, and authorities cited. Owen *v.* Miller, 10 O. S. 136; Root *v.* Davis, 51 O. S. 29, 36.

[4] Sec. 456. See sec. 585.

[5] Norton *v.* Hart, 1 Ohio, 154; Jenney *v.* Gray, 5 O. S. 45; Bremaugh *v.* Worley, 6 O. S. 597; Linduff *v.* Road Co., 14 O. S. 336.

The mere discretion of the jury upon a question of damages ought not and cannot affect the jurisdiction of the court. Hulsecamp *v.* Teel, 2 Dall. 358. See 3 Burr. (K. B.) 1592; 2 Will. 48.

interested in the disposition of a case pending in the common pleas, may be made a party co-defendant, although the amount of his claim is below the jurisdiction of such court, and it would otherwise not have jurisdiction of his case.[1]

Sec. 99. When character of action rather than amount determines jurisdiction.—In some instances the character of the action rather than the amount involved will determine the question of jurisdiction. For example, an action brought for the purchase price of real property, if founded upon the contract of sale, is an action on a contract for real estate, and although the amount of money sued for be less than one hundred dollars, it is a case for the court of common pleas, and not a magistrate's court.[2] Where the action is one at law, and the amount involved is less than one hundred dollars, it must be brought in the latter court, but if the relief asked be equitable, though the amount asked be less than one hundred dollars which is incidental to the legal relief, the cause is one for the common pleas court.

Sec. 100. Jurisdiction not lost by leaving off docket.—The court does not lose jurisdiction of a cause from the fact that for several years it was omitted from the docket by the clerk. The papers having been properly filed and the cause properly in court, it so remains until disposed of by some affirmative action upon the part of the court.[3]

Sec. 101. Courts of concurrent jurisdiction—Conflict between.—As between courts of concurrent and co-extensive jurisdiction, the one whose power is first invoked by the institution of proper proceedings, and the service of the required process, acquires the right to adjudicate upon the whole issue, and settle the rights of the parties to the exclusion of all other tribunals.[4] The rule is said to rest upon comity and necessity. But it has no application, where the powers of the court first acquiring control of the subject of litigation are so far limited, or defective, as to be unable to afford that relief to the parties to which they are either legally or equitably entitled.

The first inquiry under this rule is as to which action is first commenced. The rule furnished by the code for the determination of this question is that an action is deemed commenced at the date of the summons which is served upon the defend-

[1] Keehn *v.* Wooster, 13 O. C. C. 270.
[2] Crafts *v.* Prior, 51 O. S. 21.
[3] Farmer's College *v.* Carey, 35 O. S. 648; King *v.* Penn, 43 O. S. 57.
[4] Keating *v.* Spink, 3 O. S. 105; *Ex Parte* Bushnell, 8 O. S. 599; Taylor *v.* Carryl, 20 How. 583; State *ex. rel. v.* R. R. Co., 35 O. S. 154; Dwyer *v.* Garlough, 31 O. S. 160.

ant.[1] The jurisdiction attaches from the date of the summons which is served, but does not attach until service is actually made. It may be necessary to take into consideration the fractions of a day in some instances to determine priority. But so long as service is made in the required time, the fact that actual service may be made in an action commenced in another court before it is made in the court where the su t is first filed, is immaterial, as the priority of the commencement of the actions is determined by the date of the summons. And if there be several defendants, joint contractors or otherwise, united in interest, the action is to be deemed as commenced as to each defendant at the date of the summons so served upon him, or on a defendant united in interest with him. So that an action commenced in another forum by one of the defendants before he was actually served with summons, but after his co-defendant was served, against the plaintiff in the first action, involving the same subject-matter, will not oust the court in which the first action was brought.[2] The power of the court first taking jurisdiction cannot be collaterally questioned in the court of concurrent jurisdiction.[3]

The filing of a deed of assignment and the qualification of the assignee confers upon the probate court jurisdiction of all the assigned property, and the jurisdiction so conferred is exclusive in so far as it may be exercised so as to furnish an adequate remedy.[4] In so far as this jurisdiction does not furnish an adequate remedy it is not exclusive.[5] The filing of such deed clothes the court with jurisdiction over the real and personal property conveyed thereby, and with power to order the sale of the land and the payment of incumbrances thereon. The jurisdiction of that court being exclusive, it cannot be ousted by the commencement of an action by the mortgagee in the court of common pleas to foreclose his mortgage.[6] Whether this rule will be extended to cases of the administration of decedent's estates is not so well settled, and contrary views have been taken by trial courts, with no authoritative expressions to guide us. The query may be propounded: Does the death of a mortgagor, the appointment of an administrator and the fact that it will be necessary to sell the land to pay debts, as in the case of the filing of a deed of assignment, clothe the

[1] R. S., sec. 4987; Kinkead's Code Plg., sec. 7.

[2] Totten *v.* Lawton, 8 O. C. C. 377.

[3] State *ex rel v.* R. R. Co., 35 O. S. 154; Merrill *v.* Lake, 16 Ohio 405.

[4] Mercer *v.* Cunningham, 53 O. S. 353; citing Saylor *v.* Simpson, 45 O. S. 141; Havens *v.* Horton, 53 O. S. 342.

[5] Dwyer *v.* Garlough, 31 O. S. 158.

[6] Havens *v.* Horton, 53 O. S. 342; citing Dwyer *v.* Garlough, 31 O. S. 158; Lindeman *v.* Ingham, 36 O. S. 1; Blandy *v.* Benedict, 42 O. S. 295; Saylor *v.* Simpson, 45 O. S. 141; Betz *v.* Snyder, 48 O. S. 492; Clapp *v.* Banking Co., 50 O. S., 536; McNeil *v.* Hagerty, 51 O. S. 263.

probate court with exclusive jurisdiction to entertain a petition to sell the realty, or, may the mortgagee, before the actual filing of the petition by the administrator in the probate court, file his petition to foreclose in the common pleas court?

It has been considered that where courts have concurrent jurisdiction, that court should retain jurisdiction which can afford to all parties the fullest and most complete relief, and the fact that the mortgagee has brought a suit to foreclose in the common pleas does not prevent the administrator from bringing an action in the probate court to sell the same property, if the administrator is not made a party to the foreclosure suit.[1]

I cannot accede to this rule, but would rather say that the death of a person does not *ipso facto* clothe the probate court with exclusive jurisdiction over the deceased's land, as does the filing of a deed of assignment by an insolvent. In the latter case, the voluntary act of the insolvent has placed it in the power of the court and made it necessary to sell his land to pay debts, while in the former case, it is not certain whether it will be necessary for the court to exercise jurisdiction over the land, and this cannot be made apparent until the administrator files a petition to sell the real estate. And if before the administrator takes this step, the mortgagee files a petition to foreclose and procures service upon any of the parties, then the common pleas court acquires and will retain jurisdiction. On the other hand, if the administrator first files his petition in the probate court and procures service upon the defendants before the mortgagee files his suit to foreclose, the probate court first acquires and must retain jurisdiction.

The common pleas court has jurisdiction to entertain a case by creditors of an assignor who has made an assignment for the benefit of creditors to set aside a sale made where the purchaser entered into an agreement with a third person that such third person should abstain from bidding at such sale.[2]

An omission to invoke the jurisdiction of a court at the proper time and proper manner is a relinquishment of a right which cannot be secured by applying to another court in a different proceeding. In proceeding under the assignment laws, an assignor who omits to invoke the power of the probate court to make an allowance out of personal property in lieu of a homestead, amounts to waiver of that right, and he cannot thereafter resort to an independent action in the court of common pleas upon the bond of an assignee to recover the value of such property, even though he made demand therefor upon the assignee and the appraisers.[3]

[1] Bateman *v.* Morris, 4 O. N. P. 397.
[2] Saxton *v.* Sieberling, 48 O. S. 554.
[3] Mercer *v.* Cunningham, 53 O. S. 353.

Sec. 102. Preference of State court over United States court.—The jurisdiction of the United States courts is exclusive of that of the State courts only within the boundaries of the particular court, and such court cannot exercise any extra-territorial jurisdiction, as by the appointment of a receiver so as to authorize or empower him to seize and administer property situated in another State than where the court is located. In such instance, a State court by its process has a superor right to assume jurisdiction over property within its borders in preference to a United States court located in another State. As for example, a party may attach property in the State by garnishment through the State courts, and thereby acquire a superior right to the same as against a receiver appointed by a court of another State.[1]

Sec. 103. Appellate jurisdiction—Common pleas court. This subject is fully covered in the author's work on Pleading.[2] In exercising appellate jurisdiction the common pleas court is confined to the matters submitted to the jurisdiction of the magistrate's court. The former court is limited to the amount for which the justice is authorized to enter judgment.[3] If the appellant in such case depart from the case made in the justice's court, and introduces matters which are within the original jurisdiction of the common pleas court, the appellee may move to strike the petition from the files, or demur to it on the ground that the court had no appellate jurisdiction of this new subject of the action. But if the appellee does not take this step, but pleads to the merits, or otherwise submits himself to the jurisdiction of the court, the court thereby acquires jurisdiction over the subject-matter.[4] But if the new matter is not within the original jurisdiction of the common pleas court, then that court has no jurisdiction whatever to entertain it, and cannot acquire jurisdiction of the new subject-matter by consent of the parties, nor will any act of the parties be construed as conferring jurisdiction upon the court.[5]

Filing a motion to dismiss the appeal for want of jurisdiction would be a proper mode of procedure, or a demurrer if the want of jurisdiction is apparent on the face of the pleading.[6]

The jurisdiction of the appellate court in an appeal from an interlocutory order of the court of common pleas dissolving a provisional injunction is limited to the hearing and decision of the motion to dissolve.[7]

[1] Wilson *v.* Gifford, 12 O. C. C. 597.
[2] Sec. 1229.
[3] Woolever *v.* Stewart, 36 O. S. 146.
[4] Wilson *v.* Wilson, 30 O. S. 365; O'Neal *v.* Blessing, 34 O. S. 33, 36; Woolever *v.* Stewart, 36 O. S. 146.
[5] Strauss *v.* Adams, 4 O. N. P. 109.
[6] O'Neal *v.* Blessing, 34 O. S. 36.
[7] Trustees *v.* McClannahan, 53 O. S. 403.

Sec. 104. Appellate jurisdiction—Circuit court.—The circuit and common pleas courts are the courts of appellate jurisdiction in Ohio, and this jurisdiction is such only as is expressly conferred.[1]

All actions in which the right to a trial by jury does not exist are appealable to the circuit court from the common pleas, and there are other cases and matters specially provided for.[2] Where an appeal is taken from an order of the court of common pleas dissolving a temporary injunction, the circuit court cannot proceed upon the hearing of such appeal to hear the whole case upon its merits, as it would be practically an exercise of original jurisdiction of which it is not possessed. Such an appeal transfers the case only for hearing upon the order appealed from.[3] This subject is fully covered in the author's work on Pleading,[4] and in a later chapter in this volume.

Sec. 105. In law or equity.—When a court of law and a court of equity have concurrent jurisdiction over the same subject, it frequently happens that the former tribunal, because of inadequate or limited powers, is unable to afford that relief which a party has the right to demand, and which a court of equity is fully competent to give. In such a case, a court of equity is clothed with complete jurisdiction, and if necessary to the full protection of the rights of the party, will enjoin further proceedings in the action at law. In so doing, it but exercises that jurisdiction very commonly and properly resorted to in cases where there is no specific adequate remedy at law.[5] The general jurisdiction of the court of common pleas, both at law and in equity, and its power to permit amendments, either in the statement of facts, or in the demand for relief, in furtherance of justice, render the questions involving the boundary line between law and chancery of less practical importance in the administration of justice, than under judicial systems, where courts of law and chancery were distinct tribunals.[6] A justice's court has no equity jurisdiction.[7]

Sec. 106. Continuing jurisdiction.—The jurisdiction of the court of common pleas over the subject of the custody of minor children in divorce cases is a continuing jurisdiction, and may, on proper application, be invoked to modify orders originally made in respect to the custody of the children whenever changed conditions require it.[8] And so is the jurisdiction of the court

[1] Atwood *v.* Whipple, 48 O. S. 308.

[2] Kinkead's Code Plg., sec. 1224.

[3] Trustees *v.* McClannahan, 53 O. S. 403, 409.

[4] Sec. 1224 *et seq.*

[5] Smith *v.* McIver, 9 Wheat. 532; Dwyer *v.* Garlough, 31 O. S. 160.

[6] Culver *v.* Rodgers, 33 O. S. 537.

[7] Moore *v.* Freeman, 50 O. S. 592.

[8] Rogers *v.* Rogers, 51 O. S. 1; Hoffman *v.* Hoffman, 15 O. S. 427.

over alimony of a continuous nature where the same is made payable in installments, thus enabling the court to review, modify or vacate a former decree for alimony payable in installments. This is treated in the author's work on Pleading.[1]

Sec. 107. Jurisdiction essential to create lis pendens.—It is necessary before a pending suit can accomplish the purposes designed by the doctrine of *lis pendens* that the court shall have acquired in a proper manner jurisdiction of the subject-matter in such suit.[2]

The doctrine of *lis pendens* rests upon the jurisdiction of the court over the subject-matter involved in the suit.[3]

"To make the pendency of a suit notice, so as to affect the conscience of a purchaser, it is essential that the court have jurisdiction over the thing."[4]

Unless the petition shows upon its face a case for the jurisdiction of chancery, the proceedings cannot operate as *lis pendens*, even from the date of the process, so as to affect the property sought to be subjected, or to over-reach a subsequent sale or other disposition of it.[5]

Sec. 108. Jurisdiction in criminal cases.—All criminal cases shall be tried in the county where the offense was committed, unless it appear to the court, by affidavits, that a fair and impartial trial cannot be had therein, in which case the court shall direct that the person accused be tried in some adjoining county.[6] The question to be decided, therefore, in every case is: Where was the offense committed?

The crime of forgery consists of two acts, the forging and uttering, each of which acts may be committed in different counties. Thus it has been held that where an instrument is forged in one place and uttered in another place, the crime may be punished where the instrument is uttered.[7] It is now a generally accepted principle, that one who in one county or State employs an innocent agent in another county or State to commit a crime, is liable in the latter county.[8] The statute in Ohio provides that whoever, with fire-arms, or by sending poison or other thing, or by other means, kills or injures any person in another State or county, or whoever gives any mortal blow to any person who dies in another State or county, shall be tried

[1] Sec. 529*a* (2nd ed.).
[2] Benton *v.* Shaffer, 47 O. S. 117.
[3] *Id.*
[4] Carrington *v.* Brents, 1 McLean, 167.
[5] Jones *v.* Lusk, 2 Met. Ky. 356.
[6] R. S., sec. 7263.
[7] Lindsey *v.* State, 38 O. S. 511; Devere *v.* State, 5 O. C. C. 510.
[8] Robbins *v.* State, 8 O. S. 131; Lindsey *v.* State, 38 O. S. 512.

and punished in the county where the offender was at the time the poison or other thing was sent, or the force was used.[1]

Embezzlement.—Money may be taken from another in one county, without any design at the time, and the design to embezzle it is formed in another county. Or the design may be formed in one place where the money is taken, and the same may be carried out in another county. The rule is that the county in which the design is carried out, and not in which it was formed, is the place for trial. Hence the locality of the intent, disconnected with its execution, is an immaterial inquiry.[2]

If the defendant had possession of the money in one county in which it was his duty to account, it is no defense that he used it in another county. The non-accounting, and not the using in such case, is the crime.[3] The fact that he had expended the money in a different county from which he was required by his contract to account for it, is immaterial.[4] Where a contract is made in one county, which provides that one shall canvass in another county, and account for his doings in the county where the contract is made, and not in the county where he may be engaged, at certain stated periods, and he receives and collects money in such other county, other than where the contract is made, and converts the same to his own use in the county where he receives it, the crime of embezzlement is considered to have been committed in the county where the contract was made, and where he was to account for the money.[5]

Larceny.—It is held that the thief in larceny commits a fresh larceny in every county or place into which he flees with the stolen property in his possession. In *Stanley v. State*,[6] McIlvaine, J., said: "We fully recognize the common-law practice, that when property is stolen in one county, and the thief is afterward found in another county with the stolen property in his possession, he may be indicted in either county, but not in both. This practice obtained notwithstanding the general rule that every prosecution for a criminal offense must be in the county where the crime was committed. The reason

[1] R. S., sec. 7214.

[2] Gravatt *v.* State, 25 O. S. 162.

[3] Campbell *v.* State, 35 O. S. 70.

[4] *Id.*

[5] State *v.* Bailey, 50 O. S. 636. According to the common law, the accused could have been tried in the county either where the embezzlement was actually committed, or where the party was bound to account. Some authority goes to the effect that if the accused receives money in one county, and embezzles it in another county, he can not be tried in the county where he receives it. McClain on Crim. Law, sec. 650. That is probably true, but the crime may consist in the failure to account, which makes a difference. One who is in another county or State may commit embezzlement where he causes his employer to be defrauded by means of a check drawn upon him through a broker. McClain on Crim. Law, sec. 650.

[6] 24 O. S. 170.

for the above exception to the general rule is not certainly known, nor is it important in this case that it should be known, as it relates to the matter of venue only, and does not affect the substance of the offense." Larceny in this State consists in the taking and carrying away of property of another, and the crime is not complete until both of these acts have been committed in this State.

Homicide.—The prevailing view is, that the accused may be tried either in the county where the fatal blow was inflicted or where death ensued.[1] In Ohio, where the force was used.[2]

Bribe.—The court can only take jurisdiction over an indictment against a county official for soliciting a bribe in the county where the bribe is said to have been solicited, and not in the county where the officer holds office, if the offense is claimed to have been elsewhere.[3]

[1] In 76 Md. 317, it was said that if a man receives a mortal wound in one State, and dies in another, the prosecution should be had in the State where the wound was inflicted. This matter was finally regulated in England by statute, allowing the prosecution in either county, and it is so regulated in some of the States. McClain on Crim. Law, sec. 370.

Bishop, on Crim. Pro., sec. 50, says that as to the rule where the blow is inflicted in one jurisdiction and death ensues in another, that: "The true doctrine, perhaps universally accepted at this writing, is, that the blow is murder or not according as it produces death or not within the year and a day; whence, in all cases without the aid of statute, an indictment lies in the county where the blow was inflicted." 52 Am. St. 831.

[2] R. S., sec. 7214.

[3] State *v.* Knight, 54 O. S. 330.

CHAPTER IV.

PROCESS.

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SEC. 109. Jurisdiction—How obtained.—Jurisdiction over any cause is only obtained by the commencement of an action, filing a petition, and by the issuance of process, and the code prescribes the manner in which the court shall secure such

jurisdiction. To reach a defendant personally, so as to render any judgment which will affect him personally, it must be by a summons. To acquire jurisdiction over property of the defendant it may be by serving notice by publication, or after an action has been properly commenced by the filing of a petition and the issuance of a summons thereon, the property of the defendant may be reached by a writ of attachment, but before such a writ may be issued the requirements of the statute with reference to the commencement of an action must be complied with. A writ of attachment is only an auxiliary to the action.[1]

And in some instances it is possible that jurisdiction may be obtained so as to reach an interest in the property by the granting of a temporary injunction.

The object of process is to obtain jurisdiction of the person; but if he comes in, and by his plea admits jurisdiction, he has submitted his person to the jurisdiction of the court, and cannot take advantage of want of process, or of defective process. This is a fundamental principle of judicial action, recognized everywhere in all the books, and in all judicial action. If a party wishes to take advantage of the manner in which a case comes into a court, and of the want of jurisdiction, he should make the proper attack upon the process.[2]

Sec. 110. Commencement of action.—A civil action must be properly commenced in order to obtain jurisdiction over either person or property ; must be in accord with the provisions of the statute governing the matter, which is that : A civil action must be commenced by filing in the office of the clerk of the proper court a petition, and causing a summons to be issued thereon.[3] Jurisdiction over a cause so far as concerns the person of a defendant attaches upon the filing of a petition and the issuance of a summons.[4] It has been considered that the issuance of a summons is a condition precedent to the commencement of every action, whether service can be only had by publication or not.[5] This is not the universal practice, although it may be considered a technical compliance with the statute, which in terms prescribes that a civil action must be commenced by filing a petition and causing a summons to be issued thereon. One circuit court has held that it is not a necessary perquisite to service by publication to have summons issued and returned not served.[6] An action is deemed commenced as of the date of

[1] Central Savings Bank Company *v.* Langenbach, 1 O. N. P. 124; 35 O. S. 661.

[2] Harrington *v.* Heath, 15 Ohio, 483, 487.

[3] R. S., sec. 5032.

[4] Spinning *v.* Insurance Co., 2 Disney 337.

[5] Central Savings Bank Co. *v.* Langenbach. 1 O. N. P. 124; 1 Yaple Pl. 125; 2 Bates Pl. 983.

the summons which is served on the defendant. This matter is so thoroughly covered in the author's work on Pleading that nothing further will be added here.

Sec. 111. Writs to issue upon precipe—Its requirements.—"All writs and orders for provisional remedies and process of every kind, shall be issued by the clerks of the several courts; but before they are issued a *precipe* shall be filed with the clerk demanding the same."[1]

The plaintiff shall also file with the clerk of the court a *precipe*, stating therein the names of the parties to the action, and demanding that a summons issue.[2] The directions in the *precipe* for the indorsement to be made on the summons which is to be issued is the important essential. The law regarding the indorsement of the summons must be familiar to the draughtsman. This, too, has been discussed in the author's work on Pleading, to which reference is invited.[3] Suffice it to say here that in actions for the recovery of money the amount of money claimed must be stated in the *precipe* with directions to indorse the same on the summons.[4]

There is no statute requiring any indorsement to be made in any other class of actions than those above mentioned. Actions for the recovery of money include those for the recovery of money whether sounding in contract or *tort*.[5]

In equity cases, therefore, there is no absolute requirement that an indorsement should be made on the summons, but it would seem to be better in all cases to have the *precipe* and summons indicate what the prayer of the petition is, and such is the general practice. It has been held unnecessary in foreclosure where no personal judgment is asked.[6]

In case of default, judgment cannot be taken for an amount other than that indorsed on the summons.[7]

Sec. 112. Style or form of summons.—The summons must be under the seal of the court from which it is issued. Its style shall be, "The State of Ohio, Franklin County, Ohio," and it shall be dated the day it is issued; it shall be directed to the sheriff of the county, who shall be commanded therein to notify the defendant that he has been sued, and must answer at a time stated therein, or the petition will be taken as true and judgment rendered accordingly.

[1] R. S. 4959.
[2] R. S. 5033.
[3] Kinkead's Code Plg., sec. 46*t*.
[4] *Id.* 46*t*.
[5] Hamilton *v.* Miller, 35 O. S. 85.
[6] Conn *v.* Rhodes, 26 O. S. 644.
[7] Williams *v.* Hamlin, 1 Handy 96.

Its form is about as follows:

In the court of....., County of.....

A. B., *plaintiff*, } No.
v. } Precipe.
C D., *defendant*. }

To THE CLERK:

You will please issue a summons for the defendant, directed to the sheriff of.....County, returnable according to law, indorsed: Prayer for judgment for five thousand dollars. (*Or*, prayer for injunction and equitable relief.)

.....*Attorney*.

SEC. 113. Issuance and signing of the summons.—The summons shall be issued and signed by the clerk.[1] The nature of the *precipe* will sufficiently appear from the form given at another place. Without it the clerk is not bound to issue any process,[2] though he may do so, and the defendant cannot object.[3] But he has no latitude for the exercise of discretion. He must issue such process as he has *precipes* for, leaving to the court all questions as to the rights of the parties.[4] The deputy clerk is also empowered by statute to issue process or to perform any other official duty devolving by law upon his principal;[5] and he may sign a summons in his own name, designating his capacity as deputy,[6] though it would be more technically correct for him to sign *for his principal.*[7] It has been held that the clerk need not sign *copy* of process.[8]

SEC. 114. The date of the summons.—The statute requires that the summons shall be dated the day it is issued.[9] The date of the summons is an important factor in the commencement of an action on account of the provision that the action is deemed to have been commenced as of the date of the summons which is served on the defendant. The date of the summons determines whether or not the cause of action is barred by the statute of limitations,[10] to whether or not the suit has been begun before barred by the statute of limitations.[11] However, the date has been regarded as only *prima facie* evidence of the time of issuing the writ.[12] Parol evidence may be introduced to prove the actual

[1] R. S., sec. 5034.
[2] State *v.* Caffee, 6 Ohio, 150.
[3] Goff *v.* Russell, 3 Kan. 212; Johnson *v.* Murray, 112 Ind. 154.
[4] Patterson *v.* Wilkins, W. 501.
[5] R. S., sec. 4949.
[6] Chapin *v.* Allison, 15 Ohio, 566.
[7] Walke *v.* Bank, 15 Ohio, 288.
[8] Cochran *v.* Davis, 20 Ga. 581; Greenleaf *v.* Mumford, 19 Abb. Pr. (N. Y.) 469.
[9] R. S., sec. 5037.
[10] See Aultman *v.* Cole, 16 Neb. 4.
[11] See Aultman *v.* Cole, 16 Neb. 4.
[12] Jackson *v.* Bowling, 10 Ark. 578; Bragg *v.* Greenleaf, 14 Me. 395; not material, 4 Ind. 618; 16 Tex. 45; 15 W. Va. 677; 6 Bax. (Tenn.) 287.

date of its issuance, if there be a question on that point,[1] and, it has been held, to prove the *hour* when it was issued.[2] In an Arkansas case[3] it was held that where the statute required a writ to be dated of the day of issue, there is a presumption *de jure*, not *de facto*, that the date is right, and a party will not be permitted to show that the writ bears the wrong date, except on motion, supported by affidavit, to correct the date, and such amendment can be made.[4]

The day on which defendant is commanded to appear is called the *answer day*, and is fixed by statute.[5] In *Crowell v. Galloway*[6] it was held that no discretion vested in either the clerk or the court in respect to the return or the answer day, and defendant has a right to challenge the jurisdiction of the court if the requirements of law are disregarded. If he do so, the writ should be quashed and an *alias* summons issued.[7]

Sec. 115. Indorsement of summons.—The code prescribes what shall be indorsed upon the summons when the action is for the recovery of money. In such actions there must be indorsed on the writ the amount of money claimed, which amount is to be stated in the *precipe*, for which, with interest, judgment will be taken if the defendant fail to answer.[8] This requirement must be complied with in actions sounding *in tort* or contract, when for money,[9] before judgment can be taken against the defendant, if his appearance is not otherwise effected. Judgment cannot be taken against him by default.[10] This subject is more fully discussed in the author's work on Pleading, to which reference is made.[11] If the defendant fails to appear, and has been duly served with a summons, properly indorsed, judgment cannot be rendered for a larger amount than therein named and costs.[12]

[1] Jackson *v.* Bowling, *supra;* Allen *v.* Smith, 12 N. J. L. 159; Porter *v.* Kimball, 3 Lans. (N. Y.) 330. See also Trafton *v.* Rogers, 13 Me. 315; Robinson *v.* Barleigh, 5 N. H. 225.

[2] Allen *v.* Portland Stage Co., 8 Me. 207

[3] McLaran *v.* Thurman, 8 Ark. 313.

[4] See Dailey *v.* State, 56 Miss. 475. Mistake in date does not invalidate writ; even if there has been a disregard of statutory provisions. Swan *v.* Roberts, 2 Coldw. (Tenn.) 153. The *entire omission* of the *teste* does not invalidate. Douglas *v.* Haberstro, 88 N. Y. 611; Reynolds *v.* Damrell, 19 N. H. 394; Norton *v.* Dow, 10 Ill. 459; Craig *v.* Johnson, Hard. (Ky.) 520; U. S. *v.* Turner, 50 Fed. R. 734. But see Riggs *v.* Bagley, 2 Greene (Ia.), 383. See East *v.* Parks, 4 Greene (Ia.), 80 and Buchanan *v.* Kennon, Cam. & N (N. C.) 476, for omission of clerk's name in the *teste*.

[5] R. S., sec. 5097.

[6] 3 Neb. 215, 218.

[7] Where the statute requires the summons to read, "Answer at the time stated therein," a notice that, "Unless they answer by the 24th day of March," is sufficient. Harford *v.* Baker, 17 Neb. 443.

[8] R. S., sec. 5034.

[9] Hamilton *v.* Miller, 31 O. S. 87.

[10] Finckh *v.* Evers, 25 O. S. 82; Russell *v.* Moody, 40 O. S. 603; Kious *v.* Kious, 2 W. L. M. 418.

[11] Sec. 46*t*.

[12] R. S., sec. 5034.

The sheriff must make this indorsement upon the copy which he serves, as notice of the amount claimed must reach the defendant in this way. A return by the sheriff which fails to state that he gave the defendant a copy of the indorsement on the summons as well as a copy of the summons itself is defective.[1] The sheriff is required to indorse on every writ or order the day and hour it is received by him.[2] If by mistake the copy of the summons served has the wrong amount indorsed, the judgment for such amount is voidable only.[3] The indorsement need not necessarily be signed by the c erk and attested with the seal of the court.[4] In an action to sell mortgaged premises and for a personal judgment, it is held that no indorsement of the amount or nature of the claim is required,[5] though, if made, it will not render the process invalid.[6] An indorsement *is* necessary when personal judgment is asked as it is treated as an action for money. (R. S., sec. 5021.) No indorsement is necessary in proceedings in garnishment,[7] nor in replevin, nor in cases *in rem*.[8]

In Nebraska it has been held sufficient if the summons apprise the defendant of the nature of the claim against him.[9] So where an unnecessary indorsement was made, though stating the nature of the relief in such general terms as will inform the person served of the prayer of the petition, it is sufficient,[10] and will not be amended unless the defendant appear in the action.[11]

Sec. 116. Wrong name in summons—Effect.—Where by mistake a wrong name is inserted in a *precipe* for a summons and the summons is issued, properly indorsed as being a summons in the action, but in the body thereof the mistake of the *precipe* is followed, but the summons is duly served on the proper parties, such service is not void. It is a simple case of misnomer, and may be corrected by amendment;[12] and in *Haffield v. Board of Education*,[13] where a corporation was sued and served with summons by wrong name, and failed to appear and plead the misnomer, it was held to be concluded by the judgment entered against it.[14]

[1] Brotton *v.* Allston, 2 W. L. M. 588.
[2] R. S., sec. 4966.
[3] Bassett *v.* Mitchell, 40 Kan. 549.
[4] Abbey *v.* Dry Goods Co., 44 Kan. 415.
[5] Larrimer *v.* Clemmer, 31 O. S. 499; *cf.* Conn *v.* Rhodes, 26 O. S. 644; and see George *v.* Hatton, 2 Kan. 333; Weaver *v.* Gardner, 14 Kan. 347.
[6] Larrimer *v.* Clemmer, *supra;* Maholm *v.* Marshall, 29 O. S. 611. See 26 O. S. 644.
[7] Clark *v.* Foxworthy, 14 Neb. 243.
[8] Roggencamp *v.* Moore, 9 Neb. 105.
[9] McKay *v.* Hinman, 13 Neb. 33.
[10] Boulware *v.* County, 16 Neb. 26.
[11] Watson *v.* McCartney, 1 Neb. 131. An amendment of a summons made after notice to the defendant, relates back to the time of service. Martin *v.* Coppock, 4 Neb. 173.
[12] Burton *v.* Buckeye Ms. Co., 26 O. S. 467. *Contra.*, 1 Dis. 142.
[13] 33 Kan. 644.
[14] See Angell and Ames on Corporations (11 Ed.) 650, 651.

SEC. 117. **When summons may issue to other counties.**—When the action is rightly brought in any county according to the code provisions governing venue, a summons may then be issued to any other county, against one or more of the defendants in an action, at the plaintiff's request.[1]

SEC. 118. **Same—When the action is rightly brought—Depends upon what matters.**—Whether or not an action is rightly brought must depend upon the relation of the parties, or the substantive liability of the defendants, and upon the law of venue. The liability of the parties may be determined by their contractual relations, or upon their quasi-contractual relations, or upon mere *tort*, or upon a statutory liability.

It is not necessary to here further elucidate upon the law of venue governing the bringing of actions. We need only remember that certain actions are local and others transitory. When two or more persons are interested parties defendant to an action of either class, and the action is commenced within the proper venue as to one, then a summons may be issued to another county for the other defendant or defendants.

For instance, a local action for the recovery of real property or an interest therein, or for the partition or sale of property, under a mortgage or lien, is *rightly* brought only in the county in which the subject of the action is situate. Summons in such cases may then be issued for the parties interested as defendants to any county where they may reside, even though, I suppose, none of them should reside where the subject of the action is situate.

An action for the specific performance of a contract may be brought in any county where any one of the defendants *resides*, and summons may then be issued to any other county for other defendants.

Actions for recovery of a fine, forfeiture or statutory penalty, or against a public officer, or upon the official bond of an officer, can only be rightly brought where the cause, or some part thereof, arose, and summons may then be issued to any other county where one of the defendants resides. In this class of actions none of the defendants may be residents of the county where the cause of action arose, and the action in such case would have to be brought where the cause arose and summons then be issued to the county or counties where the defendants or any of them could be served.

Other actions can only be brought in the county where a defendant resides or where he might be summoned.[2] A defend-

[1] R. S., sec. 5035, as renumbered, 94 O. L. ——. [2] R. S., sec. 5028.

ant may then be served where he resides or where he might be summoned, and summons be issued to another county. As has been well said, the defendant in this class of actions must not be a nominal one only, but must have a real and substantial interest adverse to the plaintiff.[1]

The statute provides that no maker or acceptor, or, if the bill is not accepted, no drawer, of an instrument for the payment of money only, shall be held in an action thereon, except on warrant of attorney, in any county other than the one in which he, or one of the joint makers, acceptors, or drawers resides or may be summoned.[2]

Where one of the defendants to an action resides or can be summoned in the county where an action is brought, the indorsement of waiver and entry of appearance by one of them upon summons issued to another county does not confer jurisdiction so that summons can be issued to another county.[3] But waiver of summons and entry of appearance by a defendant resident of a county where suit is brought confers jurisdiction, the suit is rightly brought and summons may issue to another county.

Where a municipality is partly located in two counties, an action is rightly brought in one of the counties in which such municipality is brought, and summons, on the petition filed therein, may be issued to any other county, against one or more defendants.[4]

Sec. 119. Same, continued—Where may a defendant be summoned.—In transitory actions, those other than for the recovery of, sale or partition of land, or those which must be prosecuted where the cause arose, and others not necessary to mention, may be brought in the county where a defendant resides or may be summoned. There is no difficulty in determining where a person resides, but there are certain rules and principles governing the service upon one in a county other than his residence or domicile.

"*May be summoned*," etc., contemplates such a service of summons as, according to the course of proceedings at the common law, is free from the objection that it is either in active fraud of the law or tends to impede or embarrass the administration of public justice, by deterring suitors from freely attending upon all proceedings which concern them or require

[1] Allen *v.* Miller, 11 O. S. 374, 378. Jurisdiction cannot be conferred by a device, such as naming a nominal defendant against whom no judgment could be rendered. Thompson *v.* Massie, 41 O. S. 317.

[2] R. S., sec. 5035.

[3] Lamont *v.* Ins. Co., 10 W. L. B. 413.

[4] Fox *v.* Fostoria, 14 O. C. C. 471.

their presence. This language contemplates such process and such service as by well known principles constitute "good service."[1] Under this sort of a rule service upon one brought to the State upon a requisition and while held to appear for such crime is not good service.[2] Nor is service good when made upon one who is passing through the State upon a requisition from one State to another.[3] Nor can service be made upon one attending a hearing of a civil cause in which he is interested as a party, or while going to or returning from such hearing.[4] Nor do the statutes extending privileges from arrest, and providing that such privileges shall not extend to service of summons, have any application to these rules.[5]

Sec. 120. Summons returnable when.—By statute, when the time for bringing parties into court is not fixed by statute, the summons is made returnable on the second Monday after its date; but when it is issued to any other county, it may be made returnable, at the option of the party having it issued, on the third or fourth Monday after its date; and the day of the month on which it is returnable is required to be stated therein.[6] It does not follow that this provision will not permit the return day of a summons issued to another county from being fixed for the second Monday after its date, as for summons issued in the county where suit is brought; all summonses may be made returnable on the second Monday after the date thereof, whether issued within or without the county where the action is brought.[7]

Sec. 121. Alias summons.—When a writ is returned, "Not summoned," other writs may be issued until the defendant is summoned; and when defendants live in different counties, writs may be issued to such other counties at the same time.[8] While the clerk has no authority to issue an alias until the original has been returned "*non est*," or upon order of the court,[9] yet when one has been thus irregularly issued and been duly served, it is held that the defendant who fails to appear cannot object to a judgment against him taken by default.[10]

The service of an alias within the lifetime of a prior summons is neither void nor voidable, if at the time it was issued and served the prior summons was not in the hands of the officer nor under his control.[11] An alias is not necessary[12] where

[1] Andrews *v.* Lembeck, 46 O. S. 38.
[2] Compton *v.* Wilder, 40 O. S. 130.
[3] Dueber Watch Co. *v.* Dalzell, 19 W. L. B. 269.
[4] Andrews *v.* Lembeck, 46 O. S. 38.
[5] R. S., secs. 5457–59; 46 O. S. 38.
[6] R. S., sec. 5036.
[7] Devol *v.* Culner, 1 W. L. M. 387.
[8] R. S., sec. 5037.
[9] Ensign *v.* Roggencamp, 13 Neb. 30.
[10] *Id.*
[11] Williams *v.* Welton, 28 O. S. 451.
[12] Except in attachment. Pope *v.* Ins. Co., 24 O. S. 481.

the petition is amended, but the cause of action remains the same, as jurisdiction in the cause began with and continues from the original petition.[1] But where suit is changed, as from debt to assumpsit, after the service of summons, the court loses jurisdiction. The plaintiff must begin *de novo*, or take means to compel actual appearance.[2]

Sec. 121*a*. Who may serve summons.—The statute requires that the summons be served by the officer to whom it is directed, or by any person not a party to the action, who may be appointed by the officer.[3] It is the duty of the plaintiff, where there is no appearance, to see that the process of the court has been properly served, and that his adversary is in court.[4] It has been held that when process has been directed to a specified officer, it cannot be legally served by any other officer.[5]

Sec. 122. Duty of sheriff as to execution of process.—The statute requires the sheriff to execute every summons, order, or other process, and return the same as required by law.[6] He must execute such process, whether issued under a statute made before or after the date of his entrance upon the duties of his office.[7] These acts may be done also by his deputy.[8]

Sec. 123. Same—Service by one appointed by officer.—The statute authorizes service to be made by one who is duly appointed by the officer to whom it is directed ; but such person must not be a party to the action.[9] The appointment or authority of such person to serve the writ must be evidenced by an indorsement on the writ.[10] The absence of such indorsement of authority will render the service of no avail to charge third persons with notice of the suit as provided by statute ;[11] although after judgment, it will be presumed, in the absence of a showing to the contrary, that the person serving such process was lawfully authorized to do so.[12]

[1] Stover *v.* Bound, 1 Ohio St. 107; Healy *v.* Aultman, 6 Neb. 349; Schuyler Nat. Bank *v.* Ballong, 28 Neb. 484 (*Contra*, 1 W. L. M. 394).

[2] Smitherton *v.* Owens, W. 574.

[3] R. S., sec. 5038.

[4] Harshay *v.* Blackman, 20 Ia. 161; Gilbert *v.* Brown, 9 Neb. 90.

[5] Schwabacker *v.* Reilley, 2 Dill. 127; Case *v.* Humphrey, 6 Conn. 130.

[6] R. S., sec. 4970.

[7] King *v.* Nichols, 16 O. S. 80. See White *v.* Fox, 9 Shep. (Me.) 341; Bartlett *v.* Governor, 2 Bibb. (Ky.) 586; Freeholders *v.* Wilson, 1 Harr. (N. J.) 110; Governor *v.* Monfort, 1 Ired. (N. C.) 155.

[8] R. S., sec. 4949.

[9] Code, sec. 5038.

[10] Code, sec. 5038.

[11] R. S., sec. 5072; Barry *v.* Hovey, 30 O. S. 344.

[12] Gilbert *v.* Brown, 9 Neb. 90, 94. "The State of Nebraska to J. H., of said county, specially deputized to serve these papers, Greeting," is a sufficient indorsement. Haskins *v.* Bank, 12 Neb. 39.

When the writ is served by a person appointed by the officer to whom it is directed, or when the service is made out of the State, the return must be verified by oath.[1] The affidavit, when made out of the State, must be made before a person authorized by the code to take depositions, or any person authorized by a special commission of this State.[2] A clerk of a court of record of a sister State is not one of the officers authorized by this section to take depositions out of the State, and therefore is not a person before whom a return of a summons may be verified.[3]

Sec. 124. Same—How made when sheriff a party.—When the sheriff is a party or interested, process shall be directed to the coroner, or, if both these officers be interested, it may be directed to and be executed by a person designated by the court,[4] and in such case, or in any case where the court for good reason appoints another person, in the State or without, to execute process, the party so appointed shall have the same powers in the matter that the sheriff has,[5] but his return must be verified by oath.[6]

Sec. 125. Sheriff not bound to serve non-resident without costs.—The sheriff is not bound to serve the writ for a plaintiff who is a non-resident of the county, a partnership suing by its firm name, or an insolvent corporation until sufficient security for costs is furnished according to statute,[7] though if service be made without such security it will be sufficient.[8] But the writ may be indorsed for costs, by order of the court, after service and return, so as to bind the surety.[9]

Sec. 126. Sheriff has no authority outside his county.—The authority of the sheriff is confined within the territorial limits of his county. He cannot execute any kind of process except within it, and such action, whether proceeding from mistake or perversity, is void.[10] However, in the absence of proof to the contrary, the presumption is that the service was made in the officer's own county.[11]

[1] R. S., sec. 5038.

[2] Fitch *v.* Campau, 31 O. S. 646.

[3] *Id.*

[4] R. S., sec. 4967. See Murphy *v.* Swadener, 33 O. S. 85 (final process); 15 Johns. (N. Y.) 443; Keith *v.* Heffelfinger, 12 Neb. 497.

[5] R. S., sec. 4968

[6] R. S., sec. 5038; 31 O. S. 646; Forbes *v.* Bringe, (Neb.), 49 N. W. Rep. 720.

[7] R. S., secs. 5037 (1), 5038 (2); Johnson *v.* Ralph, Tap. 165; 17 Bull. 86. See R. S., sec. 5039.

[8] Johnson *v.* Ralph, *supra.*

[9] Newsom *v.* Rau, 18 O. 240 (if such order appear in the record, *scire facias* will lie against the surety); Noble *v.* Markley, W. 177.

[10] Grady *v.* Gosline, 48 O. S. 665, 669. At common law, service out of the jurisdiction of the court was not good. 5 How. Pr. (N. Y.) 34.

[11] Gilbert *v.* Brown, 9 Neb. 90; B. & O. R. R. *v.* Brant, 132 Ind. 37 (1892).

Sec. 127. Service must be made before return day.—The statute is imperative that service of summons must be made at some time before the return day.[1] "Before the return day" undoubtedly means that service should not be made *on* the return day. Any defective service is regarded as an irregularity, but not always fatal to the action. Service on the return day has been considered as only voidable. If an action has proceeded to judgment upon default, in such a case, it should not be treated as a nullity, as though no service had been made. Such a service is sufficient to give a defendant a status in the case, and to authorize him to waive the defect by answering to the merits, or if he chooses, to insist on the defect, and thus defeat the plaintiff otherwise than on the merits. But he is not permitted to refuse to do either, and afterward, if judgment is rendered against him, treat it as void.[2]

Objection may be made to such service by a motion to quash the writ. But this objection is waived by filing an answer; and after answer is filed it cannot be withdrawn for the purpose of filing a motion, nor can a motion be filed without withdrawing the answer.[3] Summons cannot be served after the return day.[4] Objection to such service, where the return was not made until two days thereafter, is deemed to have been waived by the defendants filing an answer.[5]

Service of process being a ministerial, not a judicial, act, may be made, as was the practice at common law, on Sunday,[6] and in this State such service has been held valid;[7] but unless authorized by statute, process *issued* on Sunday is void.[8]

Sec. 128. Manner of service.—The code provides two general ways by which the defendant may be notified of the action against him. Notice may be either *actual* or *constructive*, and first of,—

Actual service. The manner in which actual service may be made depends upon the character of the defendant, whether a *person*, a *partnership* sued by its firm name,[9] or a corporation.

[1] R. S., sec. 5039, as renumbered, 94 O. L. ——.

[2] Meisse *v.* McCoy, 17 O. S. 225. It will support a judgment by default, Aumock *v.* Jamison, 1 Neb. 432

Defective service gives the defendant actual notice, and the judgment, though erroneous, is valid until reversed in a direct proceeding; it cannot be attacked collaterally on that ground. Harrington *v.* Wofford, 46 Miss. 31.

[3] Schaeffer *v.* Waldo, 7 O. S. 309.

[4] Hitchcock *v.* Haight, 7 Ill. 604.

[5] Schaeffer *v.* Waldo, 7 O. S. 309. See "Curing Defective Service," *post*. Judgment by default on such service valid until set aside or reversed, by party interested. Armstrong *v.* Grant, 7 Kan. 285.

[6] Alderson Jud. Writs and Proc., sec. 12.

[7] R. S., sec. 5459; Hastings *v.* Columbus, 42 O. S. 585; 1 Bull. 115. But in Kansas the service of an order of attachment on Sunday was held void. Morris *v.* Shew, 29 Kan. 661. See R. S., Ohio, sec 5458.

[8] Van Vechten *v.* Paddock, 12 Johns. (N. Y.) 178.

[9] R. S., sec. 5017.

Service on a person depends upon his place of residence, or where he may be found, and upon the statutory regulations as to *where* suit may be brought against him.[1] If his residence is in the county where suit is brought, service of summons may be made on him by delivering to him personally (wherever he may be found) a copy of the summons with the proper indorsements, or by leaving a copy at his usual place of residence.[2] If he be a non-resident of the county where the suit is sought to be brought, but a resident of the State, and the action is one in which he may be summoned in such county,[3] he may be personally served with summons if found in the county; or, if the action be *rightly brought* in such county, according to the provisions of the code,[4] then summons may issue to any other county and be served on him personally (wherever he may be found) or by leaving a copy at his usual place of residence.[5] It will be observed that if defendant is a maker or acceptor, or if the bill be not accepted and he be the drawer, of an instrument for the payment of money *only*, he cannot be sued or held liable thereon (except on warrant of attorney) in any county, except the one in which he, or one of the joint makers, acceptors or drawers, if there be any such, resides, or *is summoned*.[6] If plaintiff is unable to secure personal service in the county where he wishes to bring suit, then he must institute it in the county where the defendant lives; or if there be other defendants, then suit can begin in any county where one of such other defendants lives and summons may issue to all of the defendants not residents of such county and be served in one of the ways mentioned.

Sec. 129. Personal service.—The statute requires, as has been stated, either personal service, or service by leaving copy at the usual place of residence, or business place. Wherever the manner of service is prescribed by statute it must be followed.[7] Therefore in making personal service, it must be personal service.[8] Service by "reading" is not personal service.[9] Personal service consists in handing the party personally a copy of the writ.

Sec. 130. Leaving copy at residence—Place of business, &c.—If the summons is served by leaving a copy thereof at the wrong place, the defendant, on motion to set the service aside, made before answering to the merits of the action, may be allowed

[1] See "Venue of Actions," R. S., Chap. V., Div. II.

[2] R. S., sec. 5039, as renumbered, 94 O. L. ——.

[3] R. S., secs. 5028, 5035, as renumbered, 94 O. L. ——.

[4] R. S., Chap. V., Div. II.

[5] R. S., secs. 5035, 5039.

[6] R. S., sec. 5035, as renumbered, 94 O. L. ——.

[7] Sheldon *v.* Comstock, 3 R. I. 84.

[8] Wright *v.* Douglas, 3 Barb. 554.

[9] Robbins *v.* Clemmens, 41 O. S. 285.

to disprove the officer's return.[1] Service on a person other than a partnership by leaving copy at his place of business is not good, the code requiring it to be left at his usual place of residence.[2] By "usual place of residence" is meant defendant's residence at the time of service,[3] or the place where he boards and keeps his personal property;[4] and service at such place is good, even though the defendant is absent[5] and does not get actual notice.[6] Actual residence depends upon both fact and intention, and both must concur.[7] A summons left where the wife was living, but the husband had left the State not to return, is not valid service.[8] Service by copy in an empty church is insufficient.[9] Service on a corporation by leaving a copy at office is good only where the chief officer cannot be found.[10] A return indorsed: "Served the same by leaving at each of the within named defendant's . . . usual place of residence," &c., where the defendants are husband and wife, shows good service.[11]

Sec. 131. Service on husband and wife.—Where defendants were husband and wife, and two copies of summons were served by leaving "at each of the within-named defendant's . . . usual place of residence a certified copy," it was held a good service on both, even though the wife was not living at the house of her husband at the time of service, it not being in evidence that she had permanently left,[12] and so when two copies were delivered to the husband with the request that he give one to his wife, although he failed to do so.[13] But process against the husband and service thereof on him alone, in a mortgage foreclosure suit, does not effect the wife's appearance,[14] and he cannot acknowledge service for her without authority from her.[15]

[1] Grady *v.* Gosline, 48 O. S. 665. 1 Nash. Pl. and Pr. 75. See "How Far Return is Conclusive," *ante*.

The existence of any fact which goes to show that the service is not correct may be set up to vacate it, and the motion should state the grounds on which the party relies. Wallis *v.* Lott, 15 How. Pr. (N. Y.) 567; Yaple's Code Pr., Vol. I., 395.

[2] Lambert *v.* Sample, 25 O. S. 336; Hayes *v.* Bank, W. 563 (left at "store"); Newlove *v.* Woodward, 9 Neb. 504; Aultman *v.* Steinman, 8 Neb. 109. "Residence" is presumed to be *usual place*. 15 O. 288.

[3] Seymour *v.* Street, 5 Neb. 88.

[4] Lee *v.* MacFee, 45 Minn. 33, 47 N. W. Rep. 309.

[5] Conley *v.* Chilcote, 25 O. S. 320.

[6] King's Election Case, 19 Can. S. C. R. (N. S.) 526.

[7] Ingraham *v.* McGraw, 3 Kan. 521.

[8] Amsbaugh *v.* Ex. Bank, 33 Kan. 100, affd. 34 Kan. 413; 39 Kan. 601.

[9] 3 Bull. 57; 1 Clev. R. 14.

[10] Fee *v.* Iron Co., 13 O. S. 563.

[11] Elliott *v.* Plattor, 43 O. S. 198.

[12] Elliott *v.* Plattor, 43 O. S. 198. See Conley *v.* Chilcote, 25 O. S. 320; Morse *v.* Engle, 28 Neb. 534.

[13] Starkweather *v.* Morgan, 15 Kan. 274.

[14] McArthur *v.* Franklin, 15 O. S. 485; Carper *v.* Woodford, 24 Neb. 135.

[15] Moore *v.* Wade, 8 Kan. 380.

Jurisdiction of the court over new parties defendant. When on motion of defendant, and upon suggestion in his answer that persons not before the

Sec. 132. Service on corporation.—May be on its chief officer, or, if he cannot be found, upon its cashier, if it have one, treasurer, clerk or managing agent; or if none of these can be found, by leaving a copy at the office or usual place of business of such corporation, with the person in charge of such office. But when service is made on a subordinate officer it must appear from the return that the chief officer could not be found, or if made "by a copy left at office," that neither the chief nor any of the subordinate officers could be found.[1] In Nebraska[2] service upon the book-keeper of a bank was held sufficient, there being no other officers present and it appearing that the book-keeper was the *managing agent.*[3] Where a defendant corporation, organized under the laws of Ohio, owning or otherwise interested in real or personal property within the jurisdiction of any court of record where such action is brought, has no officer, agent or director within the State upon whom service can be made, the court can authorize any person in or out of the State to make service of summons on such corporation by delivering to the last known president, or other chief officer or director, a copy of the summons.[4]

Railroad Companies.[5]—In case of railroad companies, whether foreign or created under the under the laws of Ohio, and whether the charter of such company prescribes the manner and place, or either, of service of process,[6] the summons may be served upon any regular ticket agent or freight agent ; or if there is no such agent, then upon any conductor, in any county in the State in which such railroad is located, or through which it passes.[7] But service on a ticket agent appointed by a receiver of the company is not good,[8] nor is service upon a traveling solicitor of the company.[9] Service on a conductor will be good even

court claim to have some interest in the subject-matter of the suit, such persons are made defendants in the action by process requiring them to answer the petition of the plaintiff, the answer of the original defendant not being in the nature of a cross-petition, and asking no relief against the new parties defendant,, it is error for the court, on default of such new parties for answer, to adjudicate upon rights of defendants *inter se*, by granting relief to the original defendant as against his newly-made co-defendants. Commercial Bank *v.* Buckingham, 12 O. S. 402.

[1] R. S., sec. 5041. Fee *v.* The Big Sand. I. Co., 13 O. S. 563; 25 Bull. 375; Palmetto Town Co. *v.* Rucker, McC. (Kan.) 146. See U. P. Ry. Co. *v.* Pillsbury, 29 Kan. 652.

[2] First Nat. Bank *v.* Turner, 30 Neb. 80.

[3] But see Chambers *v.* King Bridge Manufactory, 16 Kan. 270.

[4] R. S., sec. 5052.

[5] R. S., sec. 5041.

[6] R. S , sec. 5026, does not apply to railroad companies.

[7] R. S., sec. 5041. See M. K. & T. Ry. Co. *v.* Crowe, 9 Kan. 496.

[8] 1 C. C. R. 511.

[9] 16 Bull. 6. Service of a summons on the section foreman of a railroad company, as a local superintendent of repairs, when no officer has been designated, is valid. St. L. S. & F. Ry. Co., *v.* De Ford, 38 Kan. 299.

though the defendant railroad company has only a title by lease and user of the line passing through the county.[1]

Incorporated River Companies.—If the defendant is an incorporated river transportation company, organized under the laws of this or another State, service may be made on the master, or other chief officer, of any of its steamboats or other craft, or upon any of its authorized ticket or freight agents at any port where it transacts business.[2]

Sec. 133. Service upon foreign corporations.—Service upon a foreign corporation may be made upon the managing agent of such corporation, if there be one in the State.[3] In an action against a foreign insurance company for loss by fire, of a schooner, in the waters of another State, the defendant was served in the person of one its agents in this State. Defendant appeared and filed a motion to dismiss the action "for the reason that this court has no jurisdiction of the case, it appearing from the petition on file that said defendant is a foreign insurance company, and that no part of the alleged cause of action arose in this State." The court held, however, that the filing of the motion was a voluntary appearance and a waiver of any defect in the service of summons.[4] Service on a local agent of an express company, organized under the laws of another State and doing business in this State, was held good, although there was also a general superintendent located in the State, the local agent being the "managing agent" in the county where suit was brought.[5] An agent who transacts all of the business of a corporation at a particular place is a "managing agent" in the eye of the law.[6] In Fahs *v.* Taylor[7] the court held that a judgment against a corporation, where process was served on persons who were not called *officers*, could not be impeached by a stranger, in a suit in chancery in which the corporation, the stockholders and the individuals served are parties, and who make no objection, no fraud or collusion being charged.

[1] Railway Co. *v.* McLean, 1 C. C. R. 112–15.

[2] R. S., sec. 5044. See Handy *v.* Ins. Co., 37 O. S. 366.

[3] R. S., sec. 5043.

[4] Handy *v.* Ins. Co., 37 O. S. 366. See "Curing Defective Service," *post.*

[5] Am. Exp. Co. *v.* Johnson, 17 O. S. 641 (1867).

[6] Porter *v.* C. N.W. Ry. Co., 1 Neb. 14. See North *v.* R. R. Co., 10 O. S. 548 (Justice's Practice); 1 C. S. C. R., 3115. 2 *Id.* 75.

A foreign railroad company operating by legislative consent in this State is liable to the process of garnishment. and such process may be served as upon domestic corporations. Pa. R. R. Co. *v.* Peoples, 31 O. S. 537.

Service on insurance companies may be on the chief officer of the agency in county of suit, R. S., sec. 5045. See 1 C. S. C. R. 311; *Id.* 75; 9 Bull. 193. See Ins. Co. *v.* Eshelman, 30 O. S. 647.

Service on a director, personally, of foreign corporation not sufficient. Unless there is a managing agent within the State, proceeding *in personam* cannot reach the corporation. Barnly *v.* R. R. Co., 1 H. 571 (1855).

[7] 10 Ohio, 104 (1840).

Sec. 134. Service on dissolved corporations.—If the action is against a dissolved corporation, service may be made on the members of the last acting board of directors.[1] They may be made or become parties to any action by or against the corporation.[2] The corporation may be sued by its corporate name, for or upon any cause of action accrued, or which would have accrued against it had it not dissolved, and all process may be served by delivering to any one of the assignees, trustees, receivers, or persons having charge of its assets, a copy thereof, or by leaving such copy at the residence of any one of the officers or persons mentioned.[3]

Sec. 135. Service on infants.—"When the defendant is under the age of fourteen years, the service must be on him, and also upon his guardian, or his father; or, if neither his guardian nor his father can be found, then upon his mother, or the person having the care of such infant, or with whom he lives; if neither of these can be found, or if the defendant is a minor *over* fourteen years of age, service upon the defendant alone shall be sufficient; and the matter of service shall be the same as in the case of adults."[4] Service made on minors and upon their mother with whom they lived, by leaving certified copies with each minor and also one with their mother, and an amended return by the sheriff that he had *at the same time left copies* "at the usual place of residence" of the *father of the children*, and oral evidence that the mother was at her husband's home at the time of the service, was held sufficient to give the court jurisdiction of the parties.[5] In Mississippi[6] and South Carolina[7] it has been held that an infant cannot *accept* service.

Process on infants must be strictly served in accordance with the statute,[8] and the summons should show, as a guide to the sheriff, the age of each infant as stated in the petition.[9] If service is on the infant alone, the officer's return should show that

[1] Warner *v.* Callender, 20 O. S. 190. See R. S., sec. 5675.

[2] R. S., sec. 5675. (They must sue in their collective name, and not in their individual names. Martin *v.* Trustees, 13 O. 250.)

[3] R. S., sec. 5684. In Renick *v.* Bank (13 Ohio, 298), decided in 1844, the court, in construing the act of March 10, 1843, 41 O. L. 52, held that "a writ directed to a defunct corporation is a nullity." "The trustees of such corporation must be brought before the court."

[4] R. S., sec. 5044. See 8 O. 377; 1 O. S. 369 (foreclosure); 12 O. S. at p. 58.

[5] Bierce *v.* Bierce, 12 O. S. 241, 256. Service of notice in a partition proceeding upon the mother of an infant as its natural guardian, in the presence of the infant, is sufficient to bind the infant. Havens *v.* Drake, 43 Kan. 484; Cheney *v.* Richards, 23 Pac. Rep. (Kan.) 624.

Service may be made on non-resident minor. Gefken *v.* Graef, 77 Ga. 340.

[6] Winston *v.* McLendon, 43 Miss. 254.

[7] Whitesides *v.* Barber, 24 S. C. 187.

[8] Keys *v.* McDonald, 1 H. 287.

[9] *Id.;* 2 Law Gaz. 404.

there could be found no guardian or father, no mother or person having the care of the infant or with whom it lived, or that the minor is over fourteen years of age.[1]

Sec. 136. Service on garnishee.—When it is sought to reach by process of garnishment, property of the defendant, supposed to be in the hands of any person,[2] partnership,[3] or corporation,[4] and the officer cannot get possession of such property, he shall leave with such garnishee a copy of the order of attachment, with a written notice to appear and answer as provided by statute.[5] If the garnishee be a person and does not reside in the county in which the order of attachment is issued, the process may issue to the sheriff of the county where he lives or may be personally served;[6] but an order of attachment cannot be served on a garnishee who is a non-resident of the State.[7] Service may be personal or by leaving process at his usual place of residence,[8] and, when left at his residence, binds him, even though he is absent from home at the time of service.[9] If a partnership be garnished by its firm name[10] process may be served at its usual place of doing business;[11] and where the proceeding is against a corporation, a copy of the order and notice shall be left with the president or other principal officer, or the secretary, cashier, or managing agent thereof;[12] or if the corporation be a railroad corporation, they may be left with any regular ticket or freight agent in any county in which the railroad is located.[13]

Sec. 137. Service on partnership sued by firm name.—At common law, an action against a firm had to be brought against all the partners by name;[14] but by statute in this State, a partnership formed for the purpose of carrying on a trade or business in this State, or holding property therein, *may* sue or be sued by the usual or ordinary name which it has assumed, or by which it is known, and in such case it is not necessary to allege or prove the names of the individual members thereof.[15] This does not

[1] Keys *v.* McDonald, 1 H. 287.

[2] In hands of a guardian, 9 Bull. 64.

[3] Partnership may be garnished in its firm name,—Whitman *v.* Keith, 18 O. S. 134; Myers *v.* Smith, 29 O. S. 120; 34 O. S. 158.

[4] Including a foreign corporation doing business in this State,—Penn. R. R. Co. *v.* Peoples, 31 O. S. 537. See 15 Bull. 333; 28 Bull. 246; *cf.* 2 D. 1.

[5] Sec. 5547. R. S., sec. 5530. See Epstein *v.* Salorgne, 6 Mo. App. 352.

[6] R. S., sec. 5530.

[7] Squair *v.* Shea, 26 O. S. 645.

[8] R. S., 5534.

[9] Conley *v.* Chilcote, 25 O. S. 320.

[10] Domestic firms may be garnished by firm name, or the process may be against the individuals. 18 O. S. 134. Foreign partnership, see 2 Bull 97.

[11] R. S., sec. 5534; 18 O. S. 134.

[12] On foreign insurance company,—15 Bull. 333; 28 Bull. 246.

[13] R. S., sec. 5534; whether foreign or domestic company,—31 O. S. 537. See Author's Code Pleading, "Attachment," Vol. I., sec. 257.

[14] Parsons on Partnerships, sec. 375.

[15] R. S., sec. 5011; Haskins *v.* Alcott, 13 O. S. 210; Whitman *v.* Keith, 18 O. S. 134.

apply to foreign firms; but if an action is brought against such foreign firm in its firm name, and verdict is rendered against it without objection to the irregularity, the objection will be deemed waived.[1] But it has been held that a foreign firm may be sued as such in this State, where the same is formed for the purpose of doing business in this State, and it has a usual place of doing usiness in this State, and service may accordingl, be made at such place.[2] When it is sought to obtain a judgment that will reach the property of the individual members of the firm, suit and process must issue, as at common law, against the individuals and service made as upon other persons.[3] But it should be borne in mind that when a firm is sued by its firm name service by publication cannot be resorted to.[4] Service can only be made by leaving a copy of the summons at the firm's usual place of doing business[5] within the county where the action is commenced[6] without regard to the residence of the members of the firm.[7] If the firm has several places of doing business, in different counties, service may be at *a usual place* of doing business in the county, whether that be the principal place or not.[8]

[1] Bronson *v.* Metcalfe, 1 H. 188.

[2] Byers *v.* Schulpe, 51 O. S. 300.

[3] An execution issued on a judgment against a partnership, by its firm name, shall operate only on the partnership property. R. S., sec. 5381; 51 Ala. 186.

But after such judgment, the *members* of the firm may be made parties to the judgment by action. R. S., sec. 5370. This applies only to unincorporated companies. Neither corporations *de jure* nor *de facto* are within its provisions. Rowland *v.* Meader, 38 O. S. 269.

When persons who have taken steps toward incorporation do nothing whatever in the execution of corporate power, the mere fact of the existence of the corporation will not shield them from individual liability in an action based solely on a contract entered into by them in conducting a business wholly foreign to the objects of the corporation. Ridenour *v.* Mays, 40 O. S. 9.

Where action has been commenced against a partnership in its firm name and service of summons made by leaving copy at their usual place of doing business, the petition may be amended so as to charge the individual members; but process must be served upon them individually. Marienthal *v.* Amburgh, 2 Dis. 586. See Sims *v.* Jacobson, 51 Ala. 186, 189.

[4] Smith *v.* Hoover, 39 O. S. 249; R. S. 5048.

Not so with foreign *corporation*, whether dissolved or not. Valette *v.* Ky. Tr. Co. Bank, 2 H. 1; see 2 C. C. R. 110.

[5] R. S., sec. 5039.

[6] Grady *v.* Gosline, 48 O. S. 665.

[7] Smith *v.* Hoover, 39 O. S. 249.

In Nebraska, service on a firm sued by its firm name may be made by leaving a copy of the summons at the firm's usual place of doing business in the county, with one of the members of the firm, with the clerk or general manager; and if personal service cannot be made on any of these, it may be made by *publication* (Rosenbaum *v.* Hayden, 22 Neb. 744); or service may be made on each partner individually, as the remedy above mentioned is regarded as only cumulative (Herron *v.* Cole Bros., 25 Neb. 692).

Service on the managing member is sufficient to subject the firm property, even though one of the parties is out of the State. Winters *v.* Means, 25 Neb. 241.

[8] Grady *v.* Gosline, 48 O. S. 665.

For proceedings and service in garnishment against a partnership, see "Service on Garnishee," *ante*.

Sec. 138. The return—Its nature and requisites.—The object of the *return* is to show a compliance by the officer with the order of the court. It is a report of all proceedings had by authority of the writ issued to the sheriff, indorsed thereon, and becomes a part of the record.[1] The manner[2] and time[3] of the return are regulated by the code, and in this State the rule is settled that the statute as to the time of the return is mandatory, leaving no room for the exercise of discretion by the clerk.[4] So in Nebraska it has been held that if the clerk issue a summons returnable at any other time than the time fixed by statute, the court acquires no jurisdiction over the defendant.[5] But in Kansas[6] where a summons was made returnable in less than ten days, the statutory time, and service was made one day before the return day thereof, it was held that neither the writ nor the service was void or even voidable.

Sec. 139. Conclusiveness of return.—The return being the official report of the officer who executed the writ, and being a part of the record in the case, is regarded as conclusive evidence as to the acts of the officer, provided it shows on its face a compliance with the provisions of the statute.[7] The sheriff himself is usually concluded by his return.[8] It is *prima facie* evidence against him and binds him until set aside or explained by evidence.[9] On the other hand, in actions against a sheriff, his return, if regular on its face, is *prima facie* evidence in his favor. The plaintiff, in a motion to amerce, cannot go behind it, but must resort to his remedy for a false return ;[10] and even in this latter case the onus lies on the plaintiff.[11] Between the parties to the suit and those claiming under them as privies, and all others whose rights and liabilities are dependent upon the suit, the return of the sheriff, *of matters material to be returned*, is so far conclusive evidence that it cannot be contradicted for the purpose of invalidating the sheriff's proceedings, or defeating any right acquired under them. But such return is not conclusive as to third persons whose interests are not connected with the suit, but which may be affected by the proceedings of the sheriff.[12]

[1] R. S., secs. 5334, 5395; Daniels *v.* McBain, 2 O. S. 406.

[2] R. S., secs. 5039, 5251, 5334, 5421, 5495, 5528, 5537, 6714, 5174. &c.

[3] R. S., secs. 5036, 5418. 5496, 5526, 6713, 5189*e*, &c.

[4] Williamson *v.* Nicklin, 34 O. S. 123; 1 W. L. M. 587.

[5] Crowell *v.* Galloway, 3 Neb. 215.

[6] Clough *v.* McDonald, 18 Kan. 114. See also Swerdsfeger *v.* State, 21 Kan. 475.

[7] It must show acts within the scope of his official duties to be received as evidence. Langdon *v.* Summers, 10 O. S. 77; Andrew *v.* Parker, 6 Blackf. (Ind.) 461.

[8] Purrington *v.* Soring, 7 Mass. 388; Langdon *v.* Summers, *supra*.

[9] Wells *v.* Benefield, W. 201.

[10] Bank *v.* Domigan, 12 Ohio, 220.

It is presumed that officer did his duty. Wilkinson *v.* Turtellott, 42 Kan. 176.

[11] Langdon *v.* Summers, 10 O. S. 77, 83.

[12] Langdon *v.* Summers, *supra;* Phillips *v.* Ewell, 14 O. S. 240.

Neither is it conclusive as to collateral facts or matters not necessary or proper to be returned. The sheriff cannot alter the rights of a party by any statement in his return in favor of another, if such statement is not a necessary part of the return.[1] However, the *date* of the return is not conclusive evidence of the time when such writ was returned by him to the court. The plaintiff may prove that, as a matter of fact, the writ was not returned on the day indorsed on the writ.[2] Of course, in a suit against the sheriff for a *false return*, a direct attack is made on the return, and evidence may be introduced to show that it is false.[3]

Sec. 140. Amendment of process.—The statute provides that the court may, "in furtherance of justice," amend any pleading, process, or proceeding in case of mistake,[4] but the allowance or refusal of amendments rests in the sound discretion of the court, and their refusal will not be held erroneous unless it affirmatively appear that the discretion was abused.[5] Nothing is more common in practice than amending defective service and return, to be consistent with the truth.[6] Amendments may be made before or after final judgment,[7] but amendments to defective service and return cannot be made after final judgment, and *wholly ex parte*, at a subsequent term of the court, so as to bind parties who have acquired a claim in the property in dispute, since the petition and before the amendment,[8] though the court *perhaps* has power to allow such amendment to be made so as to be effective between the parties to the decree.[9] The sheriff cannot without leave amend his return so as to alter his liability,[10] or to prejudice the right of claims arising between the time of service or execution and the date of the amendment.[11] There is no law fixing upon any length of time as an absolute bar to motions for leave to amend.[12]

[1] Root *v.* R. R. Co., 45 O. S. 222; Brown *v.* Davis, 9 N. H. 76; Dutton *v.* Tracy, 4 Conn. 94. But see Goodall *v.* Stuart, 2 H. and M. (Va.) 105.

[2] The indorsement is made while the writ is *in the hands of the sheriff*, and this is only *prima facie* evidence as to the date when the writ itself was returned. Conkling *v.* Parker, 10 O. S. 28.

[3] Bank *v.* Domigan, 12 O. 220. See Phillips *v.* Ewell, 14 O. S. 240.

[4] R. S., sec. 5114.

[5] Clark *v.* Clark, 20 O. S. 128; Kemper *v.* Trustees, 17 Ohio, 293, 329. See 21 Me. 512; 11 Wheat. 280, 6 Cranch, 206.

[6] Fowble *v.* Rayburg, 4 Ohio, 55.

[7] R. S., sec. 5114.

[8] Barry *v.* Hovey, 30 O. S. 344; Emerson *v.* Upton, 9 Pick. (Mass.) 167.

[9] Barry *v* Hovey, *supra*.

[10] Hammer *v.* Neville, W. 169; Wells *v.* Benefield, *Id.* 201.

[11] The O. L. Ins. & T. Co. *v.* Urbana Ins. Co., 13 Ohio, 220.

[12] Fowble *v.* Rayburg, 4 Ohio, 55.

Amendment may be made after term of office has expired. 6 Bac. 160.

In New York it was held that after twenty years no judicial proceeding should be set aside. 7 Johns. 566.

In South Carolina that it would be dangerous to do so after twelve years. 1 Bay. 338.

Sec. 141. How far return is conclusive.—At common law, an averment, it was said, did not lie against the sheriff's return, because he was a sworn officer to whom the law gives credit. If he made a false return, however, he was liable to an action, and his return might be traversed.[1] By statute in this State the return becomes a part of the record in the case, and may be used in evidence in the same manner that any other part of the record may be used, provided it records acts of a strictly official character.[2] The rule has heretofore been that it cannot be questioned in a collateral proceeding, as by a suit in equity to avoid the judgment,[3] and so far as it states acts within the officer's official capacity it has always been considered conclusive against parties, privies and all whose rights or liabilities are determined by the action;[4] and, if regular on its face, it will stand until set aside by some direct proceeding for that purpose.[5] It may be impeached by direct proceeding after judgment, if it contain statements not within the officer's personal knowledge.[6] The rule has been more recently announced by the supreme court that in an action on a personal judgment a defense may be set up in contradiction of the return of service that no service has actually been made.[7]

Sec. 142. Liability of the officer serving the writ.—The sheriff is bound to a strict observance of all orders of court, and may be amerced or attached for contempt, for gross negligence in the service or execution of process, or for refusing or failing to make return, or for making false return.[8] An officer executing process is purely a ministerial officer, and generally is justified in his acts under a writ by the process he holds; especially so when it does not appear on its face to be void.[9] As a rule, he must perform the duty his precept requires when no want of jurisdiction is apparent on the face of the writ.[10] Indeed, it has been held that he has no authority to examine into the regularity of the proceedings of the court whose process he executes, or to proceed or forbear to execute such process as he may judge best; and where his process justifies his acts, it is incompetent to inquire

[1] Langdon *v.* Summers, 10 Ohio St. 77.

[2] Daniels *v.* McBain, 2 O. S. 406; Langdon *v.* Summers, *supra;* see also Ferguson *v.* Tutt, 8 Kan. 377.

[3] Johnson *v.* Jones, 2 Neb. 126; Alderson Jud. Writs and Proc., sec. 193.

[4] Root *v.* R. R. Co., 45 O. S. 227; Phillips *v.* Ellwell, 14 O. S. 244; Robbins *v.* Clements, 41 O. S. 286; McCurdy *v.* Baughman, 43 O. S. 81.

[5] Bank *v.* Domigan, 12 Ohio, 220; Mueller *v.* Bates, 2 Dis. 318; Estes *v.* Cook, 12 R. I. 6.

[6] McNeill *v.* Edie, 24 Kan. 108.

[7] Kingsborough *v.* Tousley, 56 O. S. 450.

[7] R. S., secs. 5594, 5596.

[9] Newburg *v.* Munshower, 29 O. S. 617; Murfree on Sheriffs (2nd Ed.) secs. 101*a*, 101*b*.

[10] Henline *v.* Reese, 54 O. S. 599; Bryant *v.* McCandless, 7 O. (Pt. 2) 133, 134.

into the motive which prompted him to act.[1] But this does not seem a safe rule, for the officer might have actual knowledge that he holds a defective writ, and to justify him in acting under such circumstances, though the writ be not apparently void, would not be wise. This has been so held at least by inference, for it has been held that he may refuse to execute process which is in fact void for want of jurisdiction in the court or officer issuing it, and he is not liable for refusing to execute the same.[2] 'The court said in adopting this principle, that the rule that an officer is justified by his process, not void upon its face, is one of protection only.

But the most recent decision upon this subject is that "while a ministerial officer is not obliged to serve process in his hands, when he has knowledge from other sources that the court or officer issuing it was without jurisdiction of the person against whom it is directed, he will, nevertheless, be justified in executing it according to its command, if regular in form, and want of jurisdiction does not appear upon its face."[3] The court, in adopting this rule, stated that they are aware that there are cases holding the contrary doctrine, but that it is sustained by greater weight of authority and better reason. That it is essential to an efficient adminstration of the law, that there be effectual execution of legal process, to the accomplishment of which promptness and expedition are necessary. Questions of jurisdiction are often difficult of correct determination, depending sometimes for their proper decision upon complications of fact, and the employment of legal learning and judicial investigation; and to require ministerial officers with process in their hands to execute, to stop and determine such questions by looking beyond the face of the process, before proceeding to execute it, is incompatible with the nature of their office, and would retard the administration of justice.[4]

If the subject-matter of a suit is within the jurisdiction of a court, but there is a want of jurisdiction of the person not apparent upon the face of the writ, the officer is excused. If the want of jurisdiction be apparent upon the process, he must be held liable.[5] Nor is the officer held liable if the cause is within the jurisdiction of the court, though the process be irregular.[6] He

[1] Taylor *v.* Alexander, 6 O. 144; Olin *v.* Chapin, W. 714. See Stewart *v.* Southard, 17 O. 402, where it is held that if the officer (not a sheriff or similar officer in this case) act within the scope of his authority, he is responsible only for an injury resulting from a corrupt motive.

[2] Newburg *v.* Munshower, 29 O. S. 617; as where there is no law authorizing the writ.—Levi *v.* Steamboat, 2 H. 172; Lessee of Boal *v.* King, 6 Ohio, 11. See Earl *v.* Stone, 16 Wend. (N. Y.) 562; Gwynne on Sheriffs, 573; Crocker on Sheriffs, secs. 284, 286.

[3] Henline *v.* Reese, 54 O. S. 599.

[4] Henline *v.* Reese, 54 O. S. 599.

[5] Champaign Co. Bank *v.* Smith, 7 O. S. 42, 50. But is this decision overruled by 54 O. S. 599? Savacool *v.* Boughton, 5 Wend. 170.

[6] Taylor *v.* Alexander, 6 O. 146, Pickard *v.* Bills, W. 344.

cannot refuse to execute process in a civil action because his fees are not tendered or secured in advance, unless the action is br ught by a non-resident, or by a firm in its firm name.[1]

Sec. 143. Privilege from arrest and service of process extended to whom.—The Constitution of the United States grants members of Congress privilege from arrest during their attendance at sessions of that body, and while going to and from the same, except in cases of treason, felony and breach of the peace.[2] By statute in this State this privilege is granted to members, clerks, sergeants-at-arms, doorkeepers and messengers of either branch of the General Assembly while in attendance at sessions of that body, and while going to and returning from the sessions, allowing one day for every twenty-five miles of the distance by the route ordinarily traveled.[3] It will be noticed from the language of the sections noted that the privilege extends only to arrest in civil proceedings; and from decisions upon the question,[4] and statutory provision in this State,[5] it appears that this privilege does not extend to service of summons or subpœna in civil proceedings, the statute referred to allowing the service of summons at any time, including Sunday.[6] The code further provides that any member or officer of either branch of the general assembly shall be privileged from answering to any suit which may be instituted against him in a county other than that in which he resides, upon a cause of action which accrued ten days before the first day of the session of the assembly. Such proceedings must be stayed during the session and during the time necessarily employed in going thereto and returning therefrom.[7]

Voters while attending, or going to or from, elections, judges, attorneys and other officers of court, suitors, jurors, and witnesses, while attending, or going to or from, court; Israelites, or others who religiously observe Saturday, while attending, or going to or from, their places of worship; members of the State militia, while doing duty under command of a superior officer, or while going to or returning from the place of duty or parade, are also privileged from arrest in civil proceedings; and females are privileged from the service of any process, *mesne* or final, on account of any debt, claim or demand arising upon contract.[8] But this privilege extends only to civil proceedings.[9]

[1] Whitley *v.* Long, 17 W. L. B. 89.
[2] Con., Art. I., sec. 6.
[3] R. S., sec. 5457.
[4] Wilder *v.* Welsh, 1 MacArthur (D. C.) 566 (a witness before a Congressional Committee); Nones *v.* Edsall, 1 Wall. Jr. (U. S.), 189; U. S. *v.* Cooper, 4 Dall. (Pa.), 317.
[5] R. S., sec. 5459.
[6] Hastings *v.* Columbus, 42 O. S. 585, 595.
[7] R. S., sec. 5031. See 4 W. L. M. 215.
[8] R. S., sec. 5457.
[9] R. S., sec. 5459.

Non-residents of the county, while in attendance upon court as interested parties[1] or as witnesses,[2] and non-residents of the State who have been brought into the State upon requisition,[1] are privileged from arrest and service of summons in civil proceedings while in attendance at, or going to or from, court. Service upon one inveigled by fraud into the jurisdiction of the court will be set aside upon motion.[4]

Sec. 144. Order of arrest.—(*Capias ad respondendum.*[5])—The writ of *capias ad respondendum*, or *capias*, of the old practice, is known in the Ohio code as an *order of arrest*, and is one of the "provisional remedies." It differs from the summons in that it directs that defendant be arrested and compelled to appear, whereas the summons simply commands that he be notified of the action against him and be required to appear and defend. The latter issues as a matter of course, but the former can only issue under extraordinary circumstances specifically described by the code. Before it can be issued the plaintiff or his attorney must file an affidavit setting out one of the conditions under which the writ may be issued. The affidavit must show the nature and amount of plaintiff's claim, that it is just, and must *state the facts upon which* plaintiff justifies his belief in one of the following statutory grounds for the issuance of the order: (1.) That the defendant has removed or begun to remove any of his property out of the jurisdiction of the court to defraud his creditors. (2.) That he has begun to convert his property into money to defraud his creditors. (3.) That he is fraudulently concealing his property. (4.) That he has fraudulently assigned it or otherwise disposed of it, or is about to do so, to defraud his creditors. (5.) That he fraudulently incurred the obligation. (6.) That the property sought was lost by gambling.

The statute being in derogation of personal liberty, it has been held that it must be strictly construed.[6] *The affidavit* must contain a statement of the *facts* claimed to justify the belief in the existence of the grounds on which the writ is to be issued; and without this, the writ will be void. But a statement of facts not entirely conclusive, which have a legal tendency to induce belief

[1] Andrews *v.* Lembeck, 46 O. S. 38; 12 Bull. 319; 20 *Id.* 386; Palmer *v.* Rowan, 21 Neb. 452. See Cole *v.* Hawkins, 2 Stra. 1094.

[2] Palmer *v.* Rowan, *supra.*

See generally, Alderson's Jud. Writs and Proc., sec. 118.

[3] Compton *v.* Wilder, 40 Ohio St. 130; 6 Rec. 464; 7 *Id.* 212. See 19 Bull. 269; 4 C. C. 242.

[4] Van Horn *v.* Mfg. Co., 37 Kan. 523; 40 Kan. 340; *cf.* Carney *v.* Taylor, 4 Kan. 178.

As to the exemption from service of process of those attending court, see Alderson Jud. Writs and Proc., sec. 116, *et seq.*

[5] R. S., sec. 5492.

[6] Spice *v.* Steinruck, 14 O. S. 213.

as to fraudulent intention, will sustain the order until reversed.[1] Thus a statement that defendant is about to move, without stating the facts that led to the belief that such is his intention, is insufficient.[2] But where the affidavit stated "that said H—— is about to dispose of his property with intent to defraud his creditors," it was held not faulty, even though the exact words of the statute were used, the court being of opinion that the statement was not necessarily *a legal conclusion*.[3] An affidavit that defendants sold stock for plaintiff, received the money, amounting to a stated sum over and above all charges, and embezzled and converted the same to their own use, was held sufficient to bring it under the fifth clause of the section—*fraudulently incurring* the obligation.[4] The affidavit should state the amount of the debt with certainty;[5] but if plaintiff does not know the exact amount he should say "as nearly as he is able state, and which amount named is not greater than the amount justly due him from defendant."[6] The amount of the claim should be indorsed on the writ,[7] but not the amount for which he is held to bail,[8] that being fixed by law at double the amount sworn to be due.[9] The indorsement on the writ may be amended.[10]

Sec. 145. Issuance and requisites of order to arrest.—The order will not be issued until the plaintiff has furnished bond with sufficient sureties, to the effect that he will be responsible to the defendant for all damages, not exceeding double the amount of the claim, which defendant may sustain by reason of the arrest if the order prove to be wrongfully obtained.[11] It may issue with the summons or at any time afterward before judgment,[12] and, with a copy of the affidavit, is directed to the sheriff. It shall specify the names of the parties; and it has been held that the insertion of the mere initial letters of the plaintiff is not a sufficient description of the person.[13] But a description of the Christian name that is not radically wrong, as where the writ said "Brazilla" instead of *Barzilla*, will be disregarded, unless objection is made when the writ is returned.[14] A *capias* issued on an insufficient order is void as to parties, but protects the officer.[15]

[1] Spice *v.* Steinruck, 14 O.S. 213; see 2 W. L. J. 405, 409; 3 *Id.* 131; 9 *Id.* 521; 10 *Id.* 159.

[2] 2 W. L. J. 426.

[3] Hockspringer *v.* Ballenburg, 16 Ohio, 304. See Author's Code Pleading, sec. 51 *et seq.*; R. S., sec. 5083.

[4] Este *v.* Wilshire, 44 O. S. 636.

[5] Herf *v.* Shultze, 10 Ohio, 263.

[6] See Yaple's Pr. and C., Vol. I., 889.

[7] Herf *v.* Shultze, *supra*; Weaver *v.* Russell, 18 Ohio, 497.

[8] Hockspringer *v.* Ballenburg, 16 Ohio, 304.

[9] R. S., sec. 5495.

[10] Enos *v.* Aylesworth, 8 O. S. 322.

[11] R. S., sec. 5493.

[12] R. S., sec. 5494.

[13] Herf *v.* Shultze, 10 Ohio, 263.

[14] Smith *v.* Madison, 7 Ohio (Pt. 2) 236.

Objections to affidavit waived by delay. 2 W. L. J. 131.

[15] Hyatt *v.* Robinson, 15 O. 372.

Sec. 146. Manner of execution and return of order to arrest.—The sheriff must execute the order by arresting the defendant and delivering to him a copy of the order and of the affidavit. If the defendant cannot be arrested before the return day, *alias* writs may be issued without additional affidavits. No order of arrest can issue to another county than that in which the action is brought.[1]

When the order is issued at the commencement of the action it is returnable at the same time as the summons: but when issued afterwards, it shall be returned fifteen days after its issuance.[2]

II.

CONSTRUCTIVE SERVICE.

Sec. 147. Introductory.—In addition to the method just described of obtaining jurisdiction of the defendant, the code[3] provides another, known to our practice as *constructive service*, or service by publication, which may be resorted to under specially prescribed circumstances. When courts are proceeding under such notice, they are courts of special and limited jurisdiction, and cannot extend their decree beyond the provisions of the statute, even when the proceeding is strictly *in rem*,[4] the reason being that process of the court cannot lawfully extend beyond the limits of the State into another jurisdiction. So if the record does not show the appearance of the defendant, it must show how the jurisdiction was obtained.[5]

[1] R. S., sec. 5497.

[2] R. S., sec. 5496.

Form of Capias. (Caption same as that of summons.) We command you to take ..... (defendant), and safely keep him so that you have his body safely before our ..... court forthwith (*or*, on the first day of next term), to answer unto .... (defendant), in an action of .....in damages; and have you then and there this writ with your doings thereon.

Attest: ....., *Clerk.*

[SEAL.]

Ne Exeat. This writ was a process in chancery before the adoption of the code, to prevent a party from leaving the State until bail was given. It was limited, in equity, to suits to recover an equitable debt or money demand.

As to all civil actions under the code, this writ is abolished. Cable *v.* Alvord, 27 O. S. 654 (1875).

[3] R. S., sec. 5048, *et seq.* Notice by publication is not process, but in certain cases, in contemplation of law, is equivalent to service of process. Paine *v.* Mooreland, 15 Ohio, 436, 445.

[4] Hollingsworth *v.* Barbour, 4 Pet. (U. S.) 466; Daval *v.* Daval, 13 Mass. 264; see Calkins *v.* Johnson, 20 Ohio St. 539; Trimble *v.* Longworth, 13 *Id.* 431; Cissell *v.* Pulaski Co., 3 McCrary, 449; Hartley *v.* Boynton, 17 Fed. R. 876.

[5] Atkins *v.* Atkins, 9 Neb. 191, 202. It is only by statute that the court may obtain jurisdiction over the *thing* when the *person* cannot be reached, and proceedings must be according to its provisions. Raburn *v.* Shortridge, 2 Blackf. (Ind.) 480.

Sec. 148. Its application.—The provisions of the code apply to all persons who may be opposed in interest to the plaintiff, including lunatics,[1] infants,[2] heirs or devisees, whose names and residences are unknown to the plaintiff,[3] a non-resident of the State to whom land in the State has been fraudulently conveyed to defeat or hinder creditors residing in the State,[4] but not to a partnership sued by its firm name.[5]

Sec. 149. Right of defendant served only by publication to open judgment.—This method of acquiring jurisdiction of the person of the defendant where the court had jurisdiction over his property, or the subject-matter of the action, is designed in such cases to prevent an entire failure of justice. To prevent its working too great injustice to persons beyond the jurisdiction of the court, using *jurisdiction* in its strict, common-law sense, there is a further provision of the statutes[6] that a judgment or order that has been rendered without other service than by publication may, under prescribed conditions, be opened at any time within five years after it is rendered, and the defendant let in to defend.[7] A defendant who in fact has no notice may open the judgment as a matter of course,[8] it not being a question of power on the part of the court, but a statutory right of the defendant;[9] and, it has been held, a decree so obtained may be vacated without a trial upon the merits.[10] However, the right of a defendant so served to open the judgment does not extend to interfering with the title of one who, in good faith, has purchased the property *actually* sold under such judgment, nor where the property is sold under attachment before judgment.[11] The innocent purchaser of property legally sold under the judgment will be protected, even though the defendant be let in to defend, and the original plaintiff dismiss the action, as the order of the court permitting the defendant to answer and make his defense is merely for the purpose of determining the rights of the plaintiff and defendant *inter se*.[12]

[1] Sturges *v.* Longworth, 1 Ohio St. 544.

[2] Walkenhurst *v.* Lewis, 24 Kan. 420. The law will not presume that an infant living in another State with its widowed mother has a guardian in this State upon whom service can be made. Davis *v.* Huston, 15 Neb. 28. See Morgan *v.* Burnett, 18 Ohio, 535.

[3] R. S., sec. 5053; 10 Ohio, 275.

[4] Keene *v.* Sallenbach, 15 Neb. 200.

[5] Smith *v.* Hoover, 39 O. S. 249.

[6] R. S., sec. 5355.

[7] This applies to a decree in divorce, —Carey *v.* Kemper, 45 O. S. 93; 30 Bull. 96; 3 C. C. 144. See Hemphill *v.* Hemphill, 38 Kan. 220. But not in Nebraska,—O'Connell *v.* O'Connell, 10 Neb. 390.

Notice of proceedings to open must be given to the real party in interest, Ohio Life Ins. Co. *v.* Ins. Co., 13 Ohio, 220; or to plaintiff's attorney. Merriam *v.* Gordon, 17 Neb. 325. See Yaple's Pr., etc., 607.

[8] Kepley *v.* Irwin, 14 Neb. 300, 305.

[9] Savage *v.* Aiken, 14 Neb. 315.

[10] Roberts *v.* Price, 4 W. L. M. 581.

[11] R. S., sec. 5356 Where a tract of land was not in fact sold, but by mistake was included in the report of sale. Stites *v.* Wiedner, 35 O. S. 555. See 2 C. C. R. 77; Keene *v.* Sallenbach, 15 Neb. 200.

[12] Watson *v.* Ulbrich, 18 Neb. 186.

Sec. 150. Right to open denied in certain cases.—A person who has no interest in the subject-matter of the action,[1] or one who is not a party to the record, but who, after the rendition of the judgment or decree, purchases an interest in the subject-matter of the suit, has no right to move to open the judgment.[2]

A non-resident defendant who has been served by publication will not be allowed to take advantage of this provision, where it appears that he had an agent in the State, clothed with a general power of attorney to sell the real estate of defendant, within the State, and that the agent had actual knowledge of the proceedings against the property; as notice to the agent is notice to the principal.[3]

Sec. 151. Constructive service may be made, when.—Whether or not this method of service may be used depends upon the nature of the action and upon certain conditions personal to the defendant. It may be used in the following cases, *when the defendant resides out of the State or his residence cannot be ascertained*, and the action is,—(1.) For the recovery of real property or any estate or interest therein.[4] (2.) For the partition of real property.[5] (3.) For the sale of real property under a mortgage, lien, or other incumbrance or charge.[6] A judgment of foreclosure and sale without such service is no bar to an action to redeem.[7] But in an action of foreclosure against a non-resident of the State a *personal* judgment cannot be rendered where there has been no service except by publication.[8] (4.) To compel specific performance of a contract to convey real estate situate in the State.[9] (5.) To set aside or establish a will. (6.) By an executor, administrator, guardian or other trustee against the creditors, legatees, distributees or other parties asking the direction of the court in any matter respecting the trust, estate or property to be administered.[10] Under the statutory provisions for the settlement of the estates of deceased persons, publication must be made in a newspaper of general circulation in the county where the deceased last lived, even though the land sought to be charged with the decedent's debts

[1] Powell *v.* McDowell, 16 Neb. 425.

[2] Powell *v.* McDowell, *supra:* White *v.* Merriam, *Id.* 96. See Ogden *v.* Walters, 12 Kan. 282. For the rule when a third person purchases before judgment, see "*Lis Pendens*," *post.*

[3] Merriam *v.* Calhoun, 15 Neb. 569.

[4] To quiet title. Dillon *v.* Heller, 39 Kan. 599, affd. 40 *Id.* 769.

[5] Lessee of Pillsbury *v.* Dugan's Administrator, 9 Ohio, 117; Rogers *v.* Tucker, 9 O. S. 417.

[6] Taylor *v.* Coots, 32 Neb. 30.

[7] Endell *v.* Librock, 33 O. S. 254.

[8] Wood *v.* Stanbury, 21 O. S. 142.

[9] Boswell *v.* Sharp, 15 Ohio, 447. At common law bills to enforce such contracts could be prosecuted only where the party could be personally served. Story Eq. Pl. 482; *cf.* 14 O. S. 302; 24 O. S. 474. See Kay *v.* Watson, 17 Ohio, 27.

[10] R. S., sec. 6202.

is in another county. If made in the county where the land is situated, but not where the deceased last lived, a plaintiff administrator places himself on the footing simply of one holding a "lien" or "charge" upon the land.[1] (7.) In actions in which it is sought by a provisional remedy[2] to take, or appropriate in any way, the property of the defendant [or when defendant is a foreign corporation, or a corporation organized under the laws of this State, but has neither elected officers nor appointed an agent upon whom service of summons can be made as provided by law,[3] and which has no place of doing business in the State.] Thus in an action for the recovery of money from a non-resident of the State, jurisdiction may be obtained by service by publication if he have property in the State sought to be taken by process of attachment.[4] But the seizure upon a void writ of attachment of such property will not give the court jurisdiction over the defendant to authorize service by publication or a judgment.[5] Where the relief sought is simply a money judgment, as where there is no attempt to take property by any of the provisional remedies, the court cannot acquire jurisdiction by publication.[6] (8.) In actions which relate to real or personal property, where defendant has or claims a lien thereon, or an actual or contingent interest therein, or the relief consists wholly or partly in excluding him from any interest therein (or defendant is a foreign corporation). Although a married woman is a non-resident of the State at the time of commencing the original action against her, a written contract between her and the plaintiff in which she is accepted as security for her husband on the faith and credit of her separate estate, does not afford adequate grounds for service by publication, such contract not creating a lien or charge upon her real estate.[7] (9.) In actions against executors, administrators or guardians, who have given bond as such in this State, but are non-residents of the State at the beginning of suit, or residence unknown. (10.) When defendant in petition in error has no attorney of record in the State, or is absent from the State or evading service. (11.) In an action to vacate or modify a judgment of a court, under the statute.[8] (12.) In an action to open a judgment given against a party who has not been served except by publication.[9] (13.) In proceedings to correct mistakes or omissions of the clerk, or

[1] Calkins *v.* Johnson, 20 Ohio St. 539.

[2] R. S., secs. 5491, 5593.

[3] R. S., sec. 5041.

[4] Nat. Bank *v.* L. S. & M. S. Ry. Co., 21 O. S. 221; Repine *v.* McPherson, 2 Kan. 340.

[5] Endell *v.* Leibrock, 33 O. S. 254; and see Egan *v.* Lumsden, 2 Disn. 168.

[6] Williams *v.* Welton, 28 O. S. 451, 469.

[7] Card Fabrique Co. *v.* Stanage, 50 O. S. 417.

[8] R. S., sec. 5354.

[9] R. S., sec. 5355. See "Right of defendant served only by publication to open judgment," *ante.*

irregularity in obtaining a judgment or order, under statute.[1] (14.) In actions to impeach judgments or orders, on account of fraud, or to obtain an order of satisfaction thereof "when defendant is a non-resident of the State." (15.) Where defendant is a resident, but has left the county of his residence to delay or defraud his creditors, or to avoid service, or conceals himself with like intent.[2]

In any such case, when the residence of a defendant is known, it must be stated in the publication; immediately after the first publication, the party making the service shall deliver to the clerk copies of the publication, with the proper postage, and the clerk shall mail a copy to each defendant, directed to his residence named therein, and make an entry thereof on the appearance docket;[3] and in all other cases, the party who makes the service, his agent or attorney, shall, before the hearing, make and file an affidavit that the residence of the defendant is unknown, and cannot, with reasonable diligence, be ascertained.[4]

Sec. 152. The affidavit.—As a preliminary step to securing service by publication, the plaintiff or his attorney[5] must file with the clerk of court an affidavit, stating that service of summons cannot be made within the State, and also that the case is one of those mentioned in the section authorizing service by publication.[6] The existence of a cause of action is a jurisdictional fact which must be made to appear to warrant this manner of service,[7] and the statutory method of showing it must be substantially followed, or defendant is not bound.[8] So if no affidavit is filed before publication, the court acquires no jurisdiction in the cause,[9] and all subsequent proceedings will be void.[10] The defect is not cured by filing a sufficient affidavit after the first publication.[11]

[1] R. S., sec. 5357.

[2] See Cole *v.* Hoeburg, 36 Kan. 263.

[3] See "When service complete and how proved," *post.*

[4] See Winnemiller *v.* Laughlin, 51 O. S. 421, 431.

[5] Palmer *v.* McCormick, 30 Fed. R. 82; Anderson *v.* Goff, 13 Pac. R. (Col.) 73; Davis *v.* Lum. Co., 31 Pac. R. (Col.) 187.

[6] R. S., sec. 5046.

[8] Forbes *v.* Hyde, 31 Cal. 342; Shields *v.* Miller, 9 Kan. 390; Atkins *v.* Atkins, 9 Neb. 191, 199.

[7] Forbes *v.* Hyde, 31 Cal. 342; Shields *v.* Miller, 9 Kan. 390; Atkins *v.* Atkins, 9 Neb. 191, 199.

[8] Endel *v.* Leibrock, 33 O. S. 254, 266; Frazier *v.* Miles, 10 Neb. 113; Calkins *v.* Johnson, 20 Ohio St. 539.

[9] Murphy *v.* Lyons, 19 Neb. 689; Shields *v.* Miller, 9 Kan. 390; Denning *v.* Corwin, 11 Wend. (N.Y.) 647 [Compare old case, Paine *v.* Mooreland, 15 Ohio, 435.]

[10] Endell *v.* Leibrock, 33 O. S. 254, 268. See Vallette *v.* Ky. Tr. Co. Bank, 2 H. 1, 9.

[11] Murphy *v.* Lyons, 19 Neb. 689. [See old cases, Sullivant *v.* Weaver, 10 Ohio, 275; Moore *v.* Starks, 1 Ohio St. 370; Sheldon *v.* Newton, 3 Ohio St. 504].

Sec. 153. Requisites of affidavit.—It is not necessary in the affidavit to refer specifically to the section of the code under which the action is brought;[1] nor that it be made in the exact language thereof, if the fact of non-residency of the defendant and other jurisdictional facts sufficiently appear.[2] But it has been held that an affidavit that fails to state such non-residency and inability to make service within the State,[3] or that fails to state in *some* way that the action is one of those mentioned in the statutes in which service by publication may be made,[4] is fatally defective. Plaintiff is not required, however, to state the evidence upon which the court may find the ultimate facts, but he himself must state the facts,[5] so that the court can ascertain whether such service may be had,[6] it not being sufficient merely to state that the case is one of those mentioned in the statute.[7] However, it is not required that the affidavit shall make it "appear that a cause of action exists against the defendant," as required in some States.[8] Any form of affidavit that substantially complies with the requirements of the statute is sufficient,[9] and where there is not an entire omission to state an essential fact, though it is not fully set forth, the proceedings are not void but voidable only.[10] And where an affidavit for an attachment of real estate, and for service by publication, shows the essential facts to confer jurisdiction, the court will look at both, and, if a defect in the affidavit is supplied in the affidavit for attachment, it will be sufficient.[11] So in an action against a non-resident to compel specific performance of a contract to convey real estate within the State, where the petition and the published notice were sufficient, but the affidavit was defective in that it did not state the plaintiff's cause of action "more specifically and correctly," a judgment by default was held

[1] Grebe *v.* Jones, 15 Neb. 312.

[2] Britton *v.* Larson, 23 Neb. 806.

All that the affidavit is required to show is that personal service cannot be made on defendant within the State, and that the action is one of those in which publication may be had. Gillespie *v.* Thomas, 23 Kan. 139.

[3] McGavock *v.* Pollock, 13 Neb. 535.

If it fail to state non-residency, or that defendant is in any way trying to avoid service, it is voidable, but not void. Pierce *v.* Butters, 21 Kan. 124. See Carey *v.* Reeves, 32 Kan. 718.

[**In Newman's Lessees v. The City of Cincinnati**, 18 Ohio, 323 (1849), it was held not necessary to state in the affidavit that defendant was a non-resident of the State, as the return "not found," is *prima facie* evidence that he was not in the county, and it will be presumed upon writ of error that the court satisfied itself that defendant was a non-resident.]

[4] Harris *v.* Claflin, 36 Kan. 543.

A total failure to state a material fact will give the court no jurisdiction. Fulton *v.* Levy, 21 Neb. 478. See Vallette *v.* Ky. Tr. Co. Bank, 2 H. 1.

[5] Ogden *v.* Walters, 12 Kan. 293.

[6] Claypoole *v.* Houston, 12 Kan. 324.

[7] Grebe *v.* Jones, 15 Neb. 312.

[8] Bogle *v.* Gordon, 39 Kan. 31; Grebe *v.* Jones, *supra.*

[9] Fouts *v.* Mann, 15 Neb. 172.

[10] Britton *v.* Larson, 23 Neb. 806.

[11] Miller *v.* Eastman, 27 Neb. 408.

sufficient as against a motion by defendant to set it aside.[1] An affidavit which is correct in every particular, but closes with the words, "to the best of his knowledge, information and belief," thereby qualifying the prior declarations, is defective, but not void, and may be amended by leave of court so as to make it positive.[2] Where an affidavit has been lost, it will be presumed to have been correct when attacked collaterally.[3] The omission of the clerk to affix the official seal to the affidavit does not render the affidavit invalid.[4]

Sec. 154. The published notice—How made, and requisites of.[5]—The code provides that publication must be made for six consecutive weeks[6] in a newspaper printed in the county where the petition is filed, if there be such a newspaper, or if there is not, then in one published in the State, and having a general circulation in the county. By *newspaper*, one printed in the English language is understood.[7]

One or more publications than the law requires will not invalidate the service,[8] though it is fatal if there are fewer. Notice may be printed in a daily paper, and when so done, one notice a week is sufficient. But it will not be so when published in a daily, part of the time, and in a weekly the remainder of the time.[9] It is further provided that the notice must contain a summary statement of the object and prayer of the petition, mention the court[10] where it is filed, and notify the defendant or defendants when they are required to answer. But it need not name the defendants not sought to be reached by the publication.[11] If the notice is sufficiently specific to apprise defendants of their interests to be affected, it will be sufficient.[12] So in attachment proceedings against a non-resident, in which the published notice contained a summary statement of the object and prayer of the petition, and added that *an attachment has been issued in said*

[1] Gillespie *v.* Thomas, 23 Kan. 138. The affidavit read in part, "*That said defendant is a non-resident of the State, and that service cannot be made on said defendant in the State, that said action relates to real property in which defendant claims an interest, and that the relief demanded, among other things, is the exclusion of said defendant from his interest in said real property;*" no reference to its being an action to enforce specific performance.

[2] Harrison *v.* Beard, 30 Kan. 532. See Endell *v.* Leibrock, 33 O. S. 254, 268.

[3] Head *v.* Daniels, 38 Kan. 2.

[4] Entreken *v.* Howard, 16 Kan. 551.

[5] R. S., sec. 5047.

[6] Harmon *v.* Whittimore, 1 Bull. 109.

[7] City *v.* Bickett, 26 O. S. 49.

[8] Fouts *v.* Mann, 15 Neb. 172; Taylor *v.* Coots, 32 Neb. 30; S. C. 48 Pac. R. 965.

[9] Hull *v.* C. B. & Q. R. Co., 21 Neb. 371.

[10] Endell *v.* Leibrock, 33 O. S. 254, 268.

[11] Head *v.* Daniels, 38 Kan. 1.

[12] Head *v.* Daniels, *supra;* McCormick *v.* Paddock, 20 Neb. 486; Gray *v.* May, 16 Ohio, 66.

case, it was held sufficient, as no description of the property attached was necessary.[1]

Where the notice requires defendant to answer in the *forenoon* of the day on which by law he is required to answer, it does not invalidate the notice, as he has, by law, the entire day within which to answer;[2] and where a defendant in divorce is notified to answer on or before the *second* Monday after completed service, instead of the *third*, as by law, it gives the court such jurisdiction that the judgment may not be collaterally assailed, though it might be set aside on a direct proceeding.[3]

Sec. 155. When service complete, and how proved.—Service by publication shall be deemed complete at the date of the last publication[4] when made in the manner and for the time prescribed in the preceding sections; and such service shall be proved by affidavit.[5] An affidavit by the printer,[6] the publisher, or any one acquainted with the fact, will be sufficient proof that the publication has been made as required by law;[7] and if the affidavit does not show that the notice was published according to statutory requirements, the court may, in case the judgment founded upon such service is challenged, examine copies of the paper in which the notice was published, and receive outside evidence to prove that the publication was regular and sufficient.[8] A fatal defect in the proof of publication may be cured by amendment so as to harmonize with the facts.[9]

Sec. 156 Not necessary that journal entry be made upon filing affidavit.—The prerequisite of the statute to the publication of the notice is merely that when the affidavit is filed, the party

[1] Core *v.* Oil and Oil Land Co., 40 Ohio St. 636. In Nebraska it was held that a notice was sufficient which informed the defendants that the plaintiff "has commenced a suit in attachment," and that *unless they appeared and answered*, a judgment would be entered against them by default. Warren *v.* Dick, 17 Neb. 241. But see Coston *v.* Paige, 2 W. L. M. 44; Moses *v.* McKim, *Id.* 15; Wescott *v.* Archer, 12 Neb. 345; Cohen *v.* Trowbridge, 6 Kan. 385; Lawler *v.* Whetts, 1 H. 39. (There should be a pertinent description of the mortgaged premises.)

No description necessary when only personal property is attached. Race *v.* Maloney, 21 Kan. 31.

[2] Armstrong *v.* Middlestadt, 22 Neb. 711.

[3] Wilkins *v.* Wilkins, 26 Neb. 235.

[4] Core *v.* Oil and Oil Land Co., 40 Ohio St. 636.

[5] R. S., sec. 5048.

[6] Kay *v.* Watson, 17 Ohio, 27.

[7] Taylor *v.* Coots, 32 Neb. 30.

[8] Robinson *v.* Hall, 33 Kan. 139. This provision of the code has frequently been held to be directory merely and not jurisdictional. English *v.* Woodman, 40 Kan. 412, 416 (where no proof was filed). And see Parker *v.* Miller, 9 Ohio, 108.

[9] Hamerslough *v.* Hackett, 30 Kan. 57 (but after judgment entered and after the close of the term, special notice is necessary on a motion to amend record by filing a new and sufficient proof).

There is no provision of the statute which makes the memorandum of the clerk exclusive evidence of the mailing of copies. 6 C. C. 554.

may proceed to make service by publication.[1] It is not necessary, therefore, that the court make an order authorizing the party to proceed to make such publication. But after the service has been made it remains for the court to determine that it has been legally made.

An order, however, must be made by the court, or a judge thereof, respecting the publication of notice to an heir or devisee of a deceased person who is a necessary party, when an affidavit is filed that the name and residence is unknown, the proceeding not naming him.[2] But it has been held that a finding by the court that unknown heirs had been notified by publication is, in effect, equivalent to a notice given in pursuance of the previous direction of the court.[3]

Sec. 157. Personal service out of State.—If the defendant be a non-resident of the State, and service cannot be made on him in the State, and it be a case where service may be made by publication,[4] then summons may issue to the State where he resides, and be *personally* served on him, *with a copy of the petition*,[5] and such service may be proved by affidavit and may be made by any person duly appointed to make such service.[6] But such service will not give the court jurisdiction in an action to recover a judgment for money only, to be enforced by execution,[7] nor where the action is to enforce specific performance of an agreement to convey lands without the State.[8] In such case, however, it has been held that an affidavit must be filed, as in case of service of publication, to render such service valid.

Sec. 158. Rule when not all of defendants are served. (1.) *Defendants jointly liable.*—If the action is against defendants who are jointly indebted upon contract, the plaintiff may proceed against the defendants who *have been served*, unless the court otherwise direct.[9] However, a judgment against one of them is a bar to an action afterward brought in the same cause

[1] R. S., sec. 5046.

[2] R. S., sec. 5050.

[3] Rhodes *v.* Gunn, 35 O. S. 387.

[4] Non-resident of State must be personally served or appear to give the court jurisdiction unless he can be served by publication, 28 O. S. 451.

[5] R. S., secs. 5949, 5045; where personal service is required by law no other will be good. 3 Barb. (N.Y.) 554.

[6] R. S., sec. 5041. In *Flint v. Noyes* (27 Kan. 351), held that service could be made in foreign State only by the sheriff of the county where service is to be made.

[7] Williams *v.* Welton, 28 O. S. 451. To authorize such personal service outside of the State (or service by publication), defendant must have property or debts owing to him within the State, and the relief sought must consist in taking such property or debts under some one of the provisional remedies (see "Provisional Remedies," R. S., secs. 5491—5593) of the code, or in appropriating in some way such property or debts.

[8] Penn *v.* Hayward, 14 O. S. 302. Otherwise where *all* of the parties are within the jurisdiction of the court and served with process. See 24 O. S. 474; 43 O. S. 178. See Daniels *v.* Stevens. 19 O. 222, 238.

[9] R. S., secs. 5054, 5013.

against another,[1] unless he was beyond the jurisdiction of the court at the beginning of the suit, out of the State and having no property within the State to be reached, or, if it be an action before a justice, *out of the county.*[2] By statute[3] the plaintiff may bring an action against defendants not served to make them *parties to the judgment already obtained* against those served, if they can be summoned in the State.[4] In interpreting this section, the supreme court holds that it authorizes a judgment against such joint contractors as have been served with summons only in those cases where the action was commenced by filing a petition and issuing summons against *all.* That is, summons should not only issue against all the defendants, but the return should show either service or *not found.* So where an amended petition makes new defendants, but there is no service or attempted service on the new defendants, no judgment is authorized,[5] and where a joint judgment has been rendered against all, with service on part only, the judgment is void as to those not served, but voidable only as to those served.[6] Where a non-resident of the county is made joint defendant with a party residing in the county where action is brought, a finding that the resident defendat is not liable, will render service on the non-resident in another county than that where action is brought, and any judgment sought to be entered against him, void, as the jurisdiction of the court over his person in such cases depends upon his being *rightly joined* with the resident,[7] and though he be properly joined in one action with a resident defendant, service upon him in the county of his residence, alone, in another action in which he is singly liable gives the court no jurisdiction over him as to the latter cause.[8] (2.) *Defendants severally liable.*—If the action is against defendants *severally* liable, the plaintiff may, without prejudice to his rights against those not served, proceed

[1] The President, &c., of Clinton Bank *v.* Hart, 5 O. S. 34; Sloo *v.* Lea, 18 Ohio, 279; Reynolds *v.* Ry. Co., 29 O. S. 602; Avery *v.* Van Sickle, 35 O. S. 274; *cf.* Yoho *v.* McGovern, 42 O. S. 11.

[2] Yoho *v.* McGovern, 42 O. S. 11 and cases cited. See also Williams *v.* Welton, 28 O. S. 451, 471.

[3] R. S., sec. 5366.

[4] Yoho *v.* McGovern, 42 O. S. 11, and cases cited.

A careful examination of the authorities will demonstrate that the principle upon which this rule is grounded is, that if one of several joint contractors is beyond the jurisdiction of the court—out of reach of its process—this creates a necessity of allowing the action to proceed against those within the jurisdiction, and this without affecting the liability of the former, in order to avert an entire failure of justice. *Id.*, p. 16. In such an action, it is a good defense to show that even if served, no judgment could have been obtained. Clinton Bank *v.* Hart, 19 Ohio, 372.

[5] Bazell *v.* Belcher, 31 O. S. 572.

[6] Newburg *v.* Munshower, 29 O. S. 617, citing Douglas *v.* Massie, 16 Ohio, 271; Ash *v.* McCabe, 21 O. S. 181.

[7] Allen *v.* Miller, 11 O. S. 374; Drea *v.* Carrington, 32 O. S. 595; and see Cobby *v.* Wright, 23 Neb 255; R. S. Ohio, secs. 5035, 5028.

[8] Knight *v.* Fletcher, 11 Bull. 199.

against the defendants served;[1] and judgment in such case is void as to those not served, but valid as to those served.[2] If the obligation on which suit is brought is joint *and* several, the plaintiff has his election to treat it as either joint *or* several; but he cannot do both, and sue and get judgment against all jointly or each separately. Either judgment, joint or several, is a bar to the other; but there must be a *final* judgment before it can be pleaded in abatement.[3] Where plaintiff is unable to get service on one of the defendants for a trial before a justice, he has a right to obtain such service pending an appeal.[4] In case those not served or not appearing, afterward release all error in the proceeding, the defendants who were served cannot reverse the judgment for any defect in the process or service.[5]

Sec. 159. Collateral attack of judgment based upon constructive service.—As before stated, it is by virtue of statutory provisions that a court may secure jurisdiction by means of publication of notice in *lieu* of service of summons, and the plaintiff seeking to bring the defendant within the power of the court must conform to such provisions.[6] But if the subject-matter be within jurisdiction of the court, and the court pass upon the notice and find that it has been sufficient, its finding is conclusive and can not be collaterally attacked,[7] it being presumed that where the court makes an order of publication[8] it makes it on a state of facts being proved that gave it jurisdiction and authorized the exercise of it;[9] and it has been held that this is the rule even if the record is silent as to the service of process.[10] Thus defendants upon whom no other service than by publication was had, cannot in a collateral proceeding, for the purpose of invalidating

[1] R. S., sec. 5051, subd. 2.

[2] Larrimer *v.* Clemmer, 31 O. S. 499.

[3] Clinton Bank *v.* Hart, 5 O. S. 34. Aucker *v.* Adams, 23 O. S. 543.

[4] Houston *v.* Pepperl, 49 Pac. R. 803.

[5] Ash *v.* McCabe, 21 O. S. 181; Shirley *v.* Lunenburgh, 11 Mass. 385; *cf.* Blanchard *v.* Gregory, 14 Ohio, 413.

[6] Raburn *v.* Shortridge, 2 Blackf. (Ind.) 109.

[7] See "Jurisdiction," *ante;* Lessee *v.* Sharp, 15 Ohio, 447; Rhodes *v.* Gunn, 35 O. S. 387; Lessee *v.* Loring, 17 Ohio, 409; Buchanan *v.* Roy, 2 Ohio St. 251. Judgment of a court of competent jurisdiction, though rendered apparently without service of process or notice to defendant, cannot be treated as a nullity whilst unreversed. Weyer *v.* Zane, 3 Ohio, 305; Moore *v.* Starks, 1 O. S. 369. (But see Pelton *v.* Platner, 13 Ohio, 209, 219.)

Even if the court did not examine the proof of service, and judgment was rendered by default. Williams *v.* Moorehead, 33 Kan. 609, affd. 40 *Id.* 416.

Where in a suit the appearance of unknown heirs is to be effected the finding of the court that they had been notified by the publication of a newspaper is, in effect, equivalent to a notice given in pursuance of the previous direction of the court; at least it ought to be so regarded when questioned in a collateral proceeding. Rhodes *v.* Gunn, 35 O. S. 387.

[8] Where it *does* so at all. Hammond *v.* Davenport, 16 O. S. 177, 181.

[9] Lessee *v.* Ruffin, 6 Ohio, 255.

[10] Moore *v.* Starks, 1 O. S. 369. See Richards *v.* Skiff, 8 O. S. 586; Weyer *v.* Zane, 3 Ohio, 305; Newman *v.* City, 18 *Id.* 323; Rhodes *v.* Gunn, 35 O. S. 394; Parker *v.* Miller, 9 Ohio, 108.

the title obtained under the decree of sale, draw in question the jurisdiction of the court, where, at the commencement of and during the suit, they were in fact residents of the State.[1] When process has been served on a party, which is not void, but merely irregular, he will be concluded by a judgment of the court that such service is sufficient, unless such judgment is afterward set aside or modified. It may be *directly* impeached by writ of error or bill of review.[2] But when the service is void or there is no service whatever, the essential element—jurisdiction—is lacking, and the recitals in the decree will not conclude the defendant from showing want of jurisdiction.[3] Of course, a judgment that is void may be disregarded whenever and wherever it may be met.[4]

Sec. 160. What is equivalent to service—Defective service, how cured. (1.) *Statutory provision.*—The code[5] provides that an "acknowledgment on the back of the summons[6] or petition by the party sued, or the voluntary appearance of a defendant, is equivalent to service."[7] As to what constitutes an appearance within the meaning of the statute, there are numerous adjudications. Thus a party brought in on a writ *appears*, and if he fail to object to a want of form in the writ, he waives objection and cannot urge it on error.[8]

Where in proceedings to stay execution before a justice, the judgment debtor gave an undertaking to stay, he was held to have effectually waived any defects in the service of summons in the action.[9] So also it is a well-settled rule that, *if the court have jurisdiction over the subject-matter of the action*, a defendant,—(2.) *By pleading to the merits* of the cause waives all objection to defects or irregularities in the process or the service

[1] Hammond *v.* Davenport, 16 O. S. 177. See Ogden *v.* Walters, 12 Kan. 282; Winemiller *v.* Laughlin, 51 O. S. 421; C. S. & C. R. R. Co. *v.* Village, 48 O. S. 273; Wehrle *v.* Wehrle, 39 O. S. 365.

[2] Trimble *v.* Longworth, 13 Ohio St. 431, 439; Lessee *v.* Whiteman, 2 O. S. 270.

[3] Frazer *v.* Miles, 10 Neb. 109, 114; Moore *v.* Starks, 1 O. S. 369.

A judgment of the court cannot be collaterally inquired into because of any supposed irregularity in such proceeding where such irregularity does not affect the jurisdiction of the court. English *v.* Woodman, 40 Kan. 412, 416.

[4] Winemiller *v.* Laughlin, 51 O. S. 421, 430.

[5] R. S., sec. 5040.

[6] But it is not proper for the attorney of plaintiff to acknowledge service for the defendant. Sleeper *v.* Sleeper, 1 H. 530. See 10 Bull. 413 (C. S. C.). Husband cannot acknowledge service for his wife. Moore *v.* Wade, 8 Kan. 380.

[7] Eaton *v.* Morgan, Tap. 45. It matters not that no affidavit was filed. Cheney *v.* Harding, 21 Neb. 68.

[8] Gardiner *v.* McDowell, W. 762 (a technical appearance is not necessary).

[9] Shafer *v.* Hockheimer, 36 O. S. 215; *cf.* Russell *v.* Giles, 31 *Id.* 293.

Quære as to whether the appearance of one member of a partnership cures defective service upon the firm. Whitman *v.* Keith, 18 O. S. 134, 147. See, on this point, Parsons on Partnership, old page 172, note *W.*

thereof, whether he so intends or not.[1] Thus a person who is ordered to be made a party, and applies by attorney for leave to answer, which is granted, effects his appearance so as to charge third parties with notice, even though there has been no legal service of process.[2]

In a civil action before a justice where there was defective service apparent on the return, and defendant filed with the justice a bill of particulars of his set-off, he was held to have put in an appearance.[3] And where an action was brought before a justice, of which he in fact had no jurisdiction, and the case was taken on appeal to the court of common pleas (this court having original jurisdiction of the cause), and issue joined there, it was held that no objection could be taken on the grounds of lack of jurisdiction in the justice. In this case it would stand in the higher court as an issue joined without process.[4]

By appealing, the defendant voluntarily takes the case to the higher court and asks that court to try the case and adjudicate the rights of the parties, not upon questions of law alone, but upon the facts also. He should first challenge the jurisdiction of the appellate court. By consenting to a reference, by motion and otherwise, he effectually appears, and it is of no consequence that the lower court had no jurisdiction of the subject.[5] If the question is simply as to the jurisdiction of the *person*, and the party defeated below appeals and, appearing without objecting for lack of jurisdiction of his person, pleads to the merits, *a fortiori* he waives objection to the power of the court to proceed against him.[6] In *Fee v. Big Sand Iron Co.*, the court held that

[1] Smith *v.* Hoover, 39 O. S. 249; Evans *v.* Iles, 7 O. S. 234; Buckingham *v.* McCracken, 2 O. S. 287, 296; Abernathy *v.* Latimer, 19 O. S. 286; Harrington *v.* Heath, 15 O. 483; 3 Ohio, 521; Newlove *v.* Woodward, 9 Neb. 502; McBide *v.* Hartwell, 2 Kan. 210; Catlin *v.* Rick, 91 N. Y. 668.

A plea in abatement is an appearance. Bailey *v.* Shrader, 34 Ind. 261. So is a plea of the statute of limitations. Miller *v.* Whitehead, 66 Ga. 283.

[2] Brundage *v.* Biggs, 25 O. S. 652.

Where defendants' motion to quash the writ for defective service was overruled, and defendants excepted and afterward filed their answer, it was held that the answer was a waiver of objection to the service. Schaeffer *v.* Waldo, 7 O. S. 309. See further as to *answer in Pleadings that do not effect an appearance, infra.*

[3] Godfred *v.* Godfred, 30 Ohio St. 53.

[4] Harrington *v.* Heath, 15 Ohio, 483; Bisher *v.* Richards, 9 O. S. 495; Wood *v.* O'Ferrall, 19 *Id.* 427; Thomas *v.* Penrich, 28 *Id.* 55. See also Adams Ex. Co. *v.* St. John, 17 *Id.* 641. See O'Neal *v.* Blessing, 34 O. S. 33.

[5] Mason *v.* Alexander, 44 O. S. 318, 328; Berkeley *v.* Kobes, 13 Mo. App. 503; Shawang *v.* Love, 15 Neb. 142.

Had the defendant in *this* case desired to challenge the ruling of the common pleas upon their answer to the jurisdiction, and present the question so made to this court, they should have forborne an appeal and proceeded by petition in error, or, after appeal, he should have taken leave in higher court to withdraw his answer and refile his demurrer. Mason *v.* Alexander, *supra.*

See Bartges *v.* O'Neil, 13 O. S. 75, and Gifford *v.* Morrison, 37 O. S. 502.

[6] Mason *v.* Alexander, *supra.*

a party who appeared in court to give notice of an appeal from a judgment in default, and had it entered on the record, submitted himself to the jurisdiction of the court, and could not afterward be permitted on error to allege want of jurisdiction in the court below.[1] And where the court of common pleas reversed a judgment of a justice on the petition of the defendant, for the reason that the justice had not jurisdiction of his person, it was held that the cause could be set down for trial (in the common pleas court) against the defendant's consent, as the defendant, by filing his petition in error, submitted himself to the jurisdiction of the court for trial of the case under statutory provision.[2] It matters not that no summons in error was issued or served, if the defendant appears and submits the case, either on oral argument or printed brief, the defect is cured.[3]

A defendant also *appears* BY FILING A MOTION for a continuance,[4] or consenting thereto;[5] for a change of venue,[6] to strike from the files, for irregularities, *all the papers filed by the plaintiff*, as such a motion reaches back to the petition itself, setting up irregularities and insufficiency therein;[7] to dismiss an action *for the reason that this court has no jurisdiction of the case*, it appearing *from the petition on file that said defendant is a foreign insurance company, and that no part of the alleged cause arose in the State*,[8] as the ground of such motion is not well founded.

Moving the court to vacate a judgment[9] and afterwards consenting to the dismissal of the motion, no difference what the grounds of the motion were;[10] moving to vacate the judgment on non-jurisdictional grounds, such as irregularity or error in the judgment itself,[11] is an appearance within the meaning of the code. And this is true, although in the same motion objection is also taken on jurisdictional grounds, as for defective process or service, and the defendant says that he *appears specially to object to the jurisdiction.*[12] So one who files a motion to open a judgment rendered upon constructive service only, and at the

[1] 13 O. S. 563, citing Marsden *v.* Soper, 11 *Id.* 503; Evans *v.* Iles, 7 *Id.* 233; Shafer *v.* Hockheimer, 36 *Id.* 219.

[2] The Adams Ex. Co. *v.* St. John, 17 O. S. 641; Lawlins *v.* Sacky, 6 Mon. (Ky.) 70.

What would have been proper in this case? Should defendant have filed a motion to vacate or set aside the judgment for want of jurisdiction of his person? Compare 44 O. S. at p 330.

[3] King *v.* Penn, 43 O. S. 57, 61; Bowen *v.* Bowen, 36 O. S. 315; C. C. & C. R. R. Co. *v.* Mara, 26 O. S. 190.

[4] Sargent *v.* Flaid, 90 Ind. 501; Stockdale *v.* Buckingham, 11 Ia. 45.

[5] Peters *v.* St. Louis, 59 Mo. 406.

[6] Taylor *v.* A. & P. R. R. Co., 68 Mo. 397.

[7] Maholm *v.* Marshall, 29 O. S. 611 (*cf.* Dunn *v.* Hazlett, 4 O. S. 435; Allen *v.* Miller, 11 O. S. 374).

[8] Handy *v.* Ins. Co., 37 O. S. 369; S. P. Elliott *v.* Lawhead, 43 O. S. 171, 173.

[9] Anderson *v.* Coburn, 27 Miss. 558.

[10] Marsden *v.* Soper, 11 O. S. 503.

[11] *Id.;* Watson *v.* Paine, 25 O. S. 340.

[12] Burdette *v.* Corgan, 26 Kan. 102.

same time files an answer to the merits, effects a general appearance and waives all objection to irregular service.[1] A defendant also effects his appearance BY DEMURRING GENERALLY to the petition,—the ground of the demurrer being that the petition does not state facts sufficient to constitute a cause of action.[2] So a defendant who appeared and objected to the jurisdiction of the court, "because the writ (of summons) was not directed to any person authorized by law" to serve it, and also made other objections in the nature of a demurrer;[3] and one who was served only by publication, on the mistaken supposition that he was a non-resident, and filed a motion to strike the case from the docket for want of proper service, and while this motion is pending demurs to the petition,[4] placed himself completely within the jurisdiction of the court. And in the latter case the supreme court held that the case was not changed, though defendant afterward, by leave, withdrew his demurrer.

(3.) *Pleadings that do not effect an appearance.*—When a party appears specially to object to the jurisdiction of the court over his person, *and for no other purpose*, it is not an *appearance* within the purview of this section.[5] So held of a motion denying jurisdiction on account of defective process,[6] to set aside a summons,[7] to discharge an attachment,[8] and of a demurrer *specially* on the ground that the court had no jurisdiction of the subject of the action.[9]

Where a defendant, being a non-resident of the county where the action is brought, is improperly joined with others residing in the county, and is served only in the county of his residence, his answer, in which he pleads as to the merits of the cause and also denies the jurisdiction of the court over him, does not give the court power to proceed in the matter;[10] for if the court have not jurisdiction over the subject, it cannot be conferred by a voluntary appearance.[11]

[1] Warren *v.* Dick, 17 Neb. 241, 245.

[2] Myers *v.* Smith, 29 O. S. 120; Wilson *v.* Wilson, 30 *Id.* 372; Saxton *v* Sieberling, 48 *Id.* 554, 558; O'Neal *v.* Blessing, 34 O. S. 33.

[3] Vinnedge *v.* Nicholai, 28 Neb. 133.

[4] Evans *v.* Iles, 7 O. S. 234.

[5] Smith *v.* Hoover, 39 O. S. 249; Marsden *v.* Soper, 11 O. S. 503; Newlove *v.* Woodward, 9 Neb. 502. See 11 Bull. 199.

Where the ground of the motion goes to the jurisdiction of the court over the *matter of the action* and not to its jurisdiction over the *person of the defendant*, such motion will cure any defects in the *process* or *service*. Handy *v.* Ins. Co., 37 O. S. 366. See King *v* Penn, 43 O. S. 57.

[6] Whitehead *v.* Post, 3 W. L. M. 195.

[7] White *v.* Freeze, 2 C. S. C. R. 30.

[8] Mawiecke *v.* Wolf, 3 Bull. 458.

[9] Wilson *v.* Wilson, 30 Ohio St. 365, 372. [R. S., sec. 5061.]

[10] Allen *v.* Miller, 11 O. S. 374. See Elliott *v.* Lawhead, 43 O. S. 171, 173; Mason *v.* Alexander, 44 O. S. 318, 327.

[11] King *v.* Penn, 43 O. S. 57.

Where the court has jurisdiction of the subject-matter of the suit, but defendant is exempt from being required to submit to the jurisdiction of the court, the exemption pertains to the defendant as a personal privilege which he may waive. Where it appears upon the record that the court has no jurisdiction of the cause, the failure to set up want of jurisdiction by plea is no

Where a person appears specially to object to the jurisdiction of the court, and afterwards withdraws without pleading to the merits, it is not an *appearance* that will waive objection to defective process.[1]

It has been held that where one files a petition for the removal of a cause from a State to a federal court it is not an appearance in the State court.[2]

Where service on defendant was defective, it cannot be cured by a notice in writing to the defendant of a motion to correct an omission, mistake, or clerical error in the entry of the judgment.[3] It has been held that, "while a general appearance by attorney will dispense with process to bring a defendant into court, such appearance has no retrospective effect, and is not equivalent to service in time to avoid the statute of limitations when the statutory period has elapsed before the entry of appearance."[4] But in this State it is held that while mere *consent* cannot confer jurisdiction in error after the expiration of the limitation, yet the defendant is estopped, after appearing and submitting the case, to question the jurisdiction of the court, either of the parties or the subject-matter, upon the grounds that no summons in error was issued or served within the time limited for that purpose.[5]

Sec. 161. Lis pendens, how effected.—"When the summons has been served or publication made, the action is pending so as to charge third persons with notice of its pendency; and while pending no interest can be acquired in the subject-matter thereof as against the plaintiff's title."[6] The issuance of an order of delivery in a replevin suit, and a summons, is such a beginning of the action as will prevent the defendant from defeating the rights of the plaintiff by assigning the property for the benefit of his creditors before the service of the order.[7] So an order in proceedings in aid of execution directing a debtor of the execution defendant to pay over money has the effect of *lis pendens*, and the debtor cannot discharge himself from the proceeding by paying the indebtedness to the execution defendant.[8] "These three things must concur to constitute a litigated

waiver of objection. Steamboat *v.* Long, 18 O. S. 521, 534.

[1] Graham *v.* Spencer, 14 Fed. Rep. 603.

[2] Schwab *v.* Mabley, 47 Mich. 512; Stevens *v.* Richardson, 20 Blatchf. (U. S. C. C.) 53; Small *v.* Montgomery, 17 Fed. R. 865.

[3] Lambert *v.* Sample, 25 O. S. 336.

[4] Etheridge *v.* Woodley, 83 N. C. 11.

[5] King *v.* Penn, 43 O. S. 57. In this case both parties believed that the proceeding had been duly commenced, the petition having been on file, but no summons issued. See cases cited.

[6] R. S., sec. 5052; Bennett *v.* Williams, 5 Ohio, 461; Wright *v.* Smith, 11 Neb. 343; 33 O. S. 523; 26 *Id.* 467; 21 *Id.* 131; 3 Ohio, 337; 6 Bull. 832.

[7] Collier *v.* Bickley, 33 O. S. 523.

[8] Union Bank *v.* Bank, 6 O. S. 255

condition of the property: First, the property must be of a character to be subject to the rule of *lis pendens*. Second, the court must acquire jurisdiction both of the person and the property. Third, the property must be sufficiently described in the pleadings."[1]

Sec. 162. Rule of lis pendens and its application.—"*Lis pendens* is notice of every fact contained in the pleadings which is pertinent to the trial of the matter put in issue by them,"[2] though not of every equity which by any possibility can arise out of the subject-matter of the action,[3] and of course not of matters not in issue, even though they be mentioned in the pleadings or other papers.[4] One who purchases land subject to a mortgage, while an action is pending to determine the title to such mortgage, is not affected by this rule.[5] If the action is brought to obtain a general judgment for money, there can be no *lis pendens*, even though the cause of action arose out of property specifically mentioned in the petition, as where the action is about money secured by an estate but not about the estate itself,[6]—to recover the value of such property or damages for injuries thereto.[7]

"But it is probably the law that although the contention is merely in regard to a money claim, and an auxiliary proceeding *in rem* is resorted to in the same action, as an attachment in aid of the suit at law, there is a lien that is equivalent to a *lis pendens*."[8] (2.) *Kinds of property bound by the rule.*—It may be conceded that at this day *lis pendens* applies with equal force to controversies in regard to personal property.[9] It applies to negotiable paper *past* due, and to other choses in action,[9] but not to negotiable paper *before* due.[10] So where the maker of a negotiable note was ordered to pay the amount of the note into court, to be applied on a judgment against a defendant who held such note at the time of service of process on him, the maker could not be compelled to pay such sum into court after the note had been transferred, before due, by the defendant, to another, and after it had come into possession of a *bona fide*

[1] Travis *v.* Supply Co., 42 Kan. 625, 628; Benton *v.* Shafer, 47 O. S. 117; Freeman on Judgments, secs. 193, 196, 197.

[2] Center *v.* P. & M. Bank, 22 Ala., 743; Moore *v.* Hershey, 90 Pa. St. 196; Jones *v.* McNarrin, 68 Mo. 334.

[3] Chalcross *v.* Dixon, 7 L. J. Ch. N. S. 180; Marshall *v.* Shepard, 23 Kan. 321; and see Hibles *v.* Ins. Co., 40 Ohio St. 543.

[4] Page *v.* Waring, 76 N. Y. 463.

[5] Green *v.* Rick, 121 Pa. St. 130.

[6] Worsley *v.* Earl, 3 Atk. 392.

[7] St. Jo. Mfg. Co. *v.* Daggett, 84 Ill. 556; Travis *v.* Supply Co., 42 Kan. 625, 629.

[8] Travis *v.* Supply Co., *supra*.

[9] Freeman on Judgments, sec. 194.

[10] Diamond *v.* Lawrence Co., 37 Pa. St. 353.

[11] Stone *v.* Elliott, 11 O. S. 252; Day *v.* Zimmermann, 68 Pa. St. 72; nor to stock, 21 Bull. 313.

purchaser, without actual notice of the suit.[1] The court should require the note brought into court to prevent fraudulent transfer.[2]

Lis pendens is a rule in both law and equity; it applies in proceedings to contest the validity of wills; for the foreclosure of liens of all kinds; in condemnation proceedings; but in *Davis' Lessee v. Livington*,[3] it was held that a grant of administration is not the commencement of a suit, was not a suit or prosecution pending.[4] (3.) *Jurisdiction.*—The doctrine of *lis pendens* does not apply unless the court has in some manner acquired jurisdiction of the subject-matter. So if an action is improperly brought in the wrong county, to recover real property, a third person living in the county where the land is situated who has no actual knowledge of the suit cannot be said to have constructive notice of the pendency of the action so as to be prevented from acquiring an interest in the land as against the parties to the action.[5] And it has been held that unless the petition states facts sufficient to give the court jurisdiction, the proceeding cannot operate as a *lis pendens*, even from the date of process, so as to affect any disposition of the property involved.[6] Thus in an early case[7] it was held that a bill in chancery which was defective because it did not bring the cause within the powers of the court, could not prevent the assignment, *pendente lite*, of the equity involved to a third person. (4.) *There must be valid service.*—As has been said, *lis pendens* is not effected until service is completed. But the service must be legally made. So it has been held that where the sheriff neglected to indorse on the summons the authority of another to make service, such service, though actually made by the person verbally authorized to make it and returned in due form, was not a notice to third persons of the pendency of the suit as required by law.[8] Service on a part of several defendants jointly liable on a contract, and there is no attempt at service[9] on the others, is not a beginning of an action that will warrant a judgment against any of them,[10] as every indorsement required by the law is a part of the writ, and where it is wanting, the

[1] Stone *v.* Elliott, 11 O. S. 252.

[2] *Id.;* Keiffer *v.* Ehler, 18 Pa. St. 388.

[3] 6 Ohio, 225.

[4] See also Ludlow *v.* Wade, 5 Ohio, 504.

As to the application of this doctrine to ejectment suits, see Long *v.* Neville, 29 Cal. 131; Sheridan *v.* Andrews, 3 Lans. (N. Y.) 129, reversed in 49 N. Y. 482; 27 Pa. St. 418; 59 *Id.* 49.

[5] Benton *v.* Shafer, 47 O. S. 117. See R. S., sec. 5053.

[6] Jones *v.* Lusk, 2 Met. (Ky.) 356. See Ludlow *v.* Kidd, 3 Ohio, 541; Wilkinson *v.* Elliott, 43 Kan. 590; Freeman on Judgments, sec. 195.

[7] Clarke *v.* Strong, 16 Ohio, 317.

[8] Barry *v.* Hovey, 30 Ohio St. 344.

[9] R. S., sec. 5054.

[10] Bazell *v.* Belcher, 31 O. S. 572; and see Trimble *v.* Boothby, 14 Ohio, 109; Irvin *v.* Smith, 17 *Id.* 226.

service of such writ is no service at all.[1] But in the Kansas case just cited, in which a partnership was sued, and where the fact is mentioned that in that State service must be on each individual member of the firm, it was held that "whenever any member of a co-partnership firm is served with a summons, a *lis pendens* is at once created to such an extent that no person can purchase from any member of the firm any portion of the subject-matter of the action so as to affect the rights of the plaintiff in the action. . . . If such were not the law, as soon as one member of the firm were served with summons, the other members might sell the subject-matter of the action to an innocent purchaser," thus defeating the rights of the plaintiff.[2] However, the service even of a defective summons, which may be amended under the law, is a beginning of the action which will keep it alive, although the amendment was not made until after the time within which the action might by law or special contract be brought, provided such amendment was made within the time limited for amendments.[3] Where one is ordered by the court to be made a party and applies for leave to answer, which is granted, such proceeding is sufficient to charge a subsequent purchaser from such new party with notice of the suit.[4] (5.) *Parties bound by.*—In an English case it was held that one who purchases from the plaintiff is also bound by the rule of *lis pendens*,[5] where from the nature of the case the defendant "may have in the result a right against the plaintiff as on a bill by a devisee to establish a will against an heir, if in the result the devise is declared void, the heir is not to be prejudiced by the alienation of the devisee (plaintiff) *pendente lite*."[6] In Michigan, where the law requires notice of *lis pendens* to be filed, it was held that it was not necessary to file a new one where defendant entered cross suit; as the latter suit was inseparable from the original, it was the same *lis pendens*, of which all persons were bound to take notice. Hence a purchaser from the plaintiff was bound to take notice of the rights of the defendant. "The fact that affirmative relief was asked by the defendant, was unimportant to this question; notice of the suit was notice of all which properly belonged to it."[7] (6.) *Parties*

[1] Dresser *v.* Wood, 15 Kan. 344, 349.

[2] The purchase in this case was made before the expiration of the sixty days' limit within which summons must be served or publication made to effect *lis pendens*, and publication was not begun until sixty-three days after the filing of petition. Dresser *v.* Wood, *supra*.

[3] Burton *v.* Ins. Co., 26 O. S. 467; see Meisse *v.* McCoy, 17 O. S. 225.

[4] Brundage *v.* Biggs, 25 O. S. 652. (New parties make a new *lis pendens*. —Curtis *v.* Hitchcock, 10 Paige 399.)

[5] Bellang *v.* Sabine, 1 De Gex & Jones, 580 (1857).

[6] No *lis pendens* between co-defendants or co-plaintiffs. Freeman on Judgments, sec. 200.

[7] S. C. Hall Lumber Co. *v.* Gastin, 54 Mich. 624, 634. See Tyler *v.* Thomas, 25 Beav. 47.

in interest not bound unless made parties.—The doctrine does not apply to a person who was interested in the subject-matter of the suit at the beginning of the action, but who was not made a party thereto; and he will not be estopped from perfecting his title to the property after suit begun, as by recording a deed obtained before the beginning of the action,[1] or by procuring one.[2] And one who, without actual notice, purchases from a person having a title paramount to that of either party to the action, or one that has no connection with theirs, cannot be affected by a judgment in their suit.[3] (7.) *Sale authorized by power of attorney given by mortgagor.*—A sale of mortgaged premises pursuant with the terms of a power of attorney given by the mortgagor on the date of the mortgage, the sale being for the benefit of the mortgagee, and being conditioned upon the failure to pay the note secured by the mortgage, was held valid, even though made pending a suit to foreclose, due notice of the sale having been given by advertisement, and it appearing that no fraud was practiced by or upon the mortgagor.[4] (8.) *The property must be sufficiently described on the pleadings.*—The doctrine of *lis pendens* requires that all persons, whether parties to the suit or not, shall take notice to some extent of judicial proceedings. But it applies only where the suit is about some specific property, and the property should be described and pointed out so as to give notice to the world.[5] So a bill for divorce does not bind the land of the husband, and the charge cannot operate as a lien upon his land until the decree is pronounced[6] unless the petition specifically describes certain real estate of the husband charging it with the equities of the wife and asking an injunction against the sale thereof pending suit.[7]

Sec. 163. Further consideration of what constitutes lis pendens.—(1.) *Prosecution must be continuous.*—As was stated elsewhere,[8] jurisdiction is not lost in an attachment proceeding against a non-resident where there has been a delay of eight months after return of *not found* before publication was made. Yet the benefit of the rule of *lis pendens* may be lost by such

[1] Lessee of Irwin *v.* Smith, 17 O. 226, 239.

[2] Trimble *v.* Boothby, 14 Ohio, 109. See Gibler *v.* Trimble, *Id.* 323; Porter *v.* Barclay, 18 O. S. 546; Hopkins *v.* McLaren, 4 Cow. (N. Y.) 667, 669; Freeman on Judgments (4th ed.), sec. 201; Bennett *Lis Pendens*, sec. 97.

[3] Travis *v.* Topeka Supply Co., 42 Kan. 625.

[4] Brisbane *v.* Stoughton, 17 Ohio, 482. See 10 Ohio, 208.

[5] Marshall *v.* Shepard, 23 Kan. 321; Bennett *v.* Williams, 5 Ohio, 462; Wilkinson *v.* Elliott, 43 Kan. 590; Freeman on Judgments, secs. 196, 197; Herman's Estoppel and Res Judicata, sec. 189.

[6] Hamlin *v.* Bevans, 7 Ohio (Pt. 1), 164.

[7] Tollerton *v.* Williard, 30 Ohio St. 579.

[8] Constructive Service, *ante;* Bacher *v.* Shawan, 41 O. S. 271.

long-continued inaction as amounts to gross negligence on the part of the person prosecuting the action, when such negligence would affect the rights of innocent parties.[1] There must be persistent and continuous prosecution, otherwise the protection of this rule may be lost before final judgment is reached.[2] And a plaintiff in a foreclosure suit who failed to take any action on a decree for the sale of the mortgaged premises for a period of more than twenty-one years was prevented from enforcing such decree against actual purchasers with no notice of the proceedings.[3] But this rule would seem to apply only where no rights of innocent parties had intervened.[4] (2.) *Rule where there is a new suit or revivor.*—In cases where there is a discontinuance, a non-suit or an abatement of a suit, and a new action is brought, purchasers during the pendency of the first suit are not affected by the rule.[5] But where the suit is continued by *revivor* (as it may be in case of abatement), the protection of the rule may be lost by a failure to revive within a reasonable time ;[6] though in a Kentucky case[7] it was held that if there be a reasonable excuse for the delay the *lis pendens* may be kept alive. (3.) *Bill of review and petition in error.*—It has been held that purchasers after dismissal, and before a bill of review was filed, are not *pendente lite* purchasers.[8] In Taylor *v.* Boyd[9] it was held that where, after a decree in chancery ordering the conveyance of land, the plaintiff—claiming title under the decree and defendant's failure to comply with the order within the time prescribed—in good faith conveyed the premises to a third person, before he was served with a citation in error, a reversal of the decree could not defeat the purchaser's title.[10] (4.) *Supplemental bill is a continuation of suit.*—Where in proceedings in aid of execution, the judgment creditor seeks to subject to the satisfaction of his judgment the debts of third persons due to the judgment debtor, and serves the creditors with notice to pay over, a payment of the debts to the defendant is a payment *pendente lite*, even though the judgment in the original proceeding is set aside for irregularity, at a subsequent term, and a new judgment is obtained.[11]

[1] Ludlow *v.* Kidd, 3 Ohio, 541; Freeman on Judgments, sec. 202.

[2] Herman on Executions, p. 494.

[3] Fox *v.* Reeder, 28 O. S. 181, and cases cited. See Freeman on Judgments, sec. 206.

[4] *Id.* See generally Trimble *v.* Boothby, 14 O. 109; 4 *Id.* 244; 1 A. L. R. 22; 2 Bull. 266; 6 Rec. 440.

[5] Herrington *v.* Herrington, 27 Mo. 560; Watson *v.* Wilson, 2 Dana, 408.

[6] Trimble *v.* Boothby, 14 Ohio, 109 (twelve years allowed to elapse before revivor). See 7 Bush. (Ky.) 687.

[7] Wickliffe *v.* Breckenridge, 1 Bush. 443.

[8] Ludlow *v.* Kidd, 3 Ohio, 541.

[9] 3 Ohio, 337.

[10] See Ludlow *v.* Kidd, *supra;* Freeman on Judgments, sec. 205 (for conflicting decisions).

[11] Gibson *v.* Dougherty, 10 Ohio St. 365; and see Stoddard *v.* Myers, 8 Ohio, 203; Union Bank *v.* Bank, 6 O. S. 255.

CHAPTER V.

TERMS OF COURT.

SEC.
164. Court defined.
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SEC. 164. Court defined.—A court signifies a member of the judiciary, a place where justice is administered. To give existence to a court, its officers and the time of holding it must be such as are prescribed by law.[1] There can be no court without judicial presence.[2]

SEC. 165. Terms—how regulated.—In some jurisdictions the terms of courts are regulated by statute. In Ohio the statute does not fix the terms, but leaves it to the judges to determine the terms—general and special—authorizing them also to hold adjourned terms. The statute does not give the judges authority to provide by a standing order for the holding of terms year after year. It must be done each year.[3] A term of court held at the wrong time and place has been held by many authorities to be illegal and erroneous.[4]

SEC. 166. The common-law fiction as to.—A fiction prevailed at common-law that the whole period of a term was considered as but a single day, so that everything was regarded as done upon the first day. This doctrine crept into American jurisprudence,[5]

[1] Hobart *v.* Hobart, 45 Ia. 503; *In re* McClasky, 37 Pac. 854, 856.

[2] Elliott's Pr., sec. 143.

[3] See Flanagan *v.* Borg, 67 N. W. 216 (Minn.).

[4] Elliott's Gen. Pr., secs. 163, 165.

[5] Manchester *v.* Hull, 10 N. Y. 169; Bennett *v.* Davis, 3 Cow. 68; Newhall *v.* Sawyer, 92 U. S. 761; Griswold *v.* Stewart, 4 Cow. 457; Nichols *v.* Chapman, 9 Wend. 452. "For some purposes the term is considered an entire day, and the journal of every day, so long as the term continues, is open to the correction of the court." Tobert *v.* Coffin, 6 O. 33. Rev. St., sec. 5375, provides that judgments other than by confession become a lien from the first day of the term.

but as this fiction was intended to promote and not evade justice it cannot be permitted to work a wrong.[1]

Sec. 167. Terms of supreme court.—By statute the supreme court is required to meet on Tuesday after the first Monday of January to hold a term of court ; and the court is authorized to hold such special and general terms at such times and place as the judges may determine. If a special term is held elsewhere than in Columbus, thirty days' notice must be given thereof.[2]

Sec. 168. Terms of circuit court.—The judges of the circuit court are required to meet on the third Tuesday in September annually and fix the time of their terms in each county for the next year. This may be changed by the judges in any circuit when the business thereof requires it. The orders or assignment of the terms must be entered by the clerk on the journal and published.[3]

Sec. 169. Terms of common pleas courts—Statutory provisions.—The statute provides that the judges of common pleas court in each common pleas district, or the majority of them, shall, on the third Tuesday in October in each year, issue their written order to the clerk of common pleas court in each county in such district, fixing the time of the commencement of each term of the common pleas court in each county of such district for the next judicial year; which shall commence on the first day of January; and any order so made may be changed by a subsequent order made and issued by them and the several clerks of the court in the district; and the court shall be held for a year covered by such order or orders at the times so ordered; provided that not less than three terms of the common pleas court shall be held in any county each year.[4] The clerk of such court of each county is required to enter such order upon the journal of the court of his county, and such entries are sufficient evidence as to the legal terms for holding the courts as herein

[1] Clifton *v.* Wynne, 81 N. C. 160. The court will not endure that a mere fiction of law, introduced for the sake of justice, should work a wrong, contrary to the real truth and substance of the thing. Johnson *v.* Smith, 2 Burr. 950, 963; 1 Wm. Black, 207, 215. "By fiction of the law the whole term, the whole time of the assizes and the whole session of parliament may be, and sometimes are, considered as one day, yet the matter of fact shall overturn the fiction in order to do justice between the parties. Maulle J. in Wrangham *v.* Hersey, 3 Wils. 274. Many embarrassments were encountered in the attempt to enforce the rigid rule of relation, and in many cases where its results were ridiculous, the application of the fiction was disregarded. Clifton *v.* Wynne, 81 N. C. 163.

[2] R. S., sec. 410.

[3] R. S., sec. 449.

[4] R. S., sec. 457.

ordered; and such clerk shall also cause a copy thereof to be published in one or more newspapers of general circulation, once a week for three consecutive weeks.[1]

The regular term of the court of common pleas in Hamilton county shall begin on the first Monday in January, the first Monday of April, the first Monday of July, and the first Monday of October in each year.[2]

In Cuyahoga County the common pleas court is authorized by statute, when it is deemed proper by reason of the approaching termination of any term, to continue and adjourn such trial to the next term on a day certain.[3] The time of commencement of a term is to be determined by the record of the court, and by the statutes. Parol evidence is not admissible for that purpose.[4] All the business of one term remaining undisposed of at the end of the term goes over to the next term without any formal order to that effect.[5]

Sec. 170. Terms of probate courts.—Shall be considered as holding for the purpose of granting a new trial and other relief after judgment, in each year, three terms of four months each, the first commencing on the first of January of each year.[6]

Sec. 171. Special terms.—Any judge of the court of common pleas may appoint and hold a special term of such court when the same, in his opinion, is necessary in any county of his subdivision ; and in such case the judge shall issue his order for such special term to the clerk of the county wherein the same is to be held, at least three weeks prior to the commencement of such term, and the clerk shall forthwith cause the order or notice of the holding of such term, to be published in the newspapers of the county or in general circulation therein.[7] The holding of a special term is made to depend upon the opinion of the judge as to the want of time at a regular term, to dispose of the business, or whether, from other circumstances, there exists a good cause for appointing such special term.[8] The same business may be transacted at a special term as at a regular term ; new cases can be noted for such term and tried thereat ;[9] and though an order appointing a special term specify the particular business to be transacted at such term, still any other business may be transacted where it does not take parties by surprise.[10]

[1] R. S., sec. 458.
[2] R. S., sec. 463.
[3] R. S., sec. 467.
[4] Hemminway *v.* Davis, 24 O. S. 150. The record is conclusive of facts appearing. Davis *v.* Messenger, 17 O. S. 231.
[5] State *v.* Wells, 54 Kan. 170.
[6] R. S., sec. 5365.
[7] R. S., sec. 461.
[8] Merchant *v.* North, 10 O. S. 251.
[9] Smith *v.* R. R. Co., 53 N. W. 173.
[10] Wharton *v.* Sims, 88 Ga. 617.

Sec. 172. Adjourned terms of common pleas.—Courts are not limited in their power of adjournment, to an adjournment from day to day to the succeeding day. They are invested with an inherent power to adjourn to some distant day.[1] The statute in Ohio, however, regulates the matter of adjourned terms. It is provided that: When the state of business in any court of common pleas is such as to render it necessary, such court may hold an adjourned term for the purpose of completing the business of the regular term, notice thereof having been first entered upon the journal of the court at the regular term at which the adjourned term is appointed.[2] If the journal entry leaves it doubtful whether an additional term was intended, or whether it was a regular term adjourned to a distant time, the rule is that the former construction ought to be preferred, because adjournment to a distant day is generally regarded as highly impolitic, and ought not, except for very weighty and special reasons, take place.[3] And where no regular entry of adjournment is made, but the records show that after a certain day there is no business transacted until the commencement of the following term, the first term mentioned should be deemed to have closed on the last day on which business was transacted, though there is no entry of adjournment ordered by the court.[4] The adjournment to the time of the commencement of the regular term in another county, in the absence of showing that the court was held in both counties at the same time, invalidates the proceedings at the adjourned term.[5] The entry of the adjournment *sine die* of a separate session held by one of the judges in counties where there are several judges holding court, while one or more of the judges were still holding their several terms, does not have the effect of adjourning the whole court, or of putting an end to the term. An adjournment under such circumstances must be made by an entry ordered by all of the judges.[6] A failure of the court to meet at a time when the court is authorized to meet, has been held to invalidate a conviction at the term convened after such day.[7]

Sec. 173. Holding court at unauthorized time.—It is said that parties cannot enter into an agreement at the term of court especially held at a time different from that determined in the regular way;[8] and there is an abundance of precedents to the

[1] *In re* Dossett, 37 Pac. 1066 (Okla.). Courts of superior jurisdiction have authority to hold adjourned terms. Bank *v.* Withers, 6 Wheat, 107; Harris *v.* Gest, 4 O. S. 469; Smurr *v.* State, 105 Ind. 128.

[2] R. S., sec. 460.

[3] Harris *v.* Gest, 4 O. S. 469, 473.

[4] Johnson *v.* Railway Co., 47 O. S. 318.

[5] State *v.* Rogers, 43 Pac. 256.

[6] Paris *v.* Coppock, 7 O. C. C. 402.

[7] Wilson *v.* State, 35 S. W. 390.

[8] Bromley *v.* State, 20 Ark. 77; Greenwood *v.* Bradford, 128 Mass. 296; Bates *v.* Gage, 40 Cal. 183.

effect that any proceeding held at the time where there is no authority therefor, renders the same nugatory,[1] in a trial and conviction at the time when the court cannot be legally held a nullity.[2]

Sec. 174. What judge may do "at chambers," or in vacation.—It no doubt frequently perplexes counsel to readily determine what a judge may do at chambers. The phrase "at chambers" is a technical one. It is thus defined by Burrill: "The office or private rooms of the judge, where parties are heard, and orders made, in matters not requiring to be brought before the full court, when costs are taxed, judgment signed, and similar business transacted." And thus by Bouvier: "When a judge decides some interlocutory matter, which has arisen in the course of the case, he is said to make such decisions at 'chambers.'"

At common law, judges of the various courts, independently of legislative authority, exercised a very extensive jurisdiction over proceedings in an action or defense at chambers as well as in term time.[3] A judge can exercise in vacation only such judicial functions as are expressly authorized by statute.[4] It is said by the supreme court[5] that: "Jurisdiction at chambers is incidental to, and grows out of the jurisdiction of the court itself. It is a power to hear and determine, out of court, such questions arising between the parties to a controversy as might well be determined by the court itself, but which the legislature has seen fit to intrust to the judgment of a single judge, out of court, without requiring them to be brought before the court in actual session." It is provided in the constitution[6] that: "The jurisdiction of the courts of common pleas and of the *judges thereof*, shall be fixed by law." This phrase is to be understood in its ordinary sense. It distinguishes between common pleas courts and the *judges thereof*. This distinction is also further

[1] Clelland *v.* People, 4 Colo. 244.

[2] *In re* Terrill, 52 Kan. 29; *In re* McClasky, 52 Kan. 34; Wilson *v.* State, 35 S. W. 390.

Judge Elliott, in his excellent work on Practice, says: "The conflict in the adjudged cases upon the subject of holding courts at a time other than that prescribed by statute is a stubborn one, and, as indicated in the preceding paragraph, some of the courts have gone to great lengths. These courts have, as it seems to us, gone beyond principle and have not been mindful of the principle that there may be a *de facto* tribunal." (Sec. 163.) "A term of the session of the court is held by judicial officers having a color of authority and color of right to hold a session or term, there is, as we believe, a *de facto* term, although there may not be one *de jure*. There may be and there often is a *de facto* court, and if there may be a *de facto* tribunal capable of pronouncing judgment valid as against collateral attacks, there is no reason why there may not be a *de facto* term against which judgment may be rendered, against which collateral attacks may not prevail.

[3] 3 Chitty's Pr. 19. Chitty says that it would be difficult, if not impracticable, to trace an inception of the practice.

[4] Nevitt *v.* Woodburn, 45 Ill. App. 417.

[5] Railway Co. *v.* Hurd, 17 O. S. 144.

[6] Sec. 4, Art. 4.

indicated elsewhere in the constitution,[1] providing that: "The several judges of the common pleas, and of such other courts as may be created, shall respectively have and exercise such power and jurisdiction, at chambers or otherwise, as may be directed by law."

By virtue of this constitutional provision we must look to the statutes and determine what powers may be exercised by judges at chambers, and in the absence of statutory authority conclude that there exists none not specially conferred.

The words "common pleas courts" and *judges thereof*, are used designedly in both constitution and statutes. Common pleas courts do not mean a judge of that court in vacation or at chambers.[2] And in those statutes where it authorizes common pleas courts *or a judge* thereof to do certain things, there is authority conferred upon the judge to do the things therein authorized. This is best illustrated by the statute relating to an injunction.[3] It provides that an injunction may be granted by the supreme court, circuit court, common pleas court, or probate court, *or a judge thereof*, in causes pending therein, or at the commencement of an action. This means to confer upon the judges at chambers the power to grant an injunction.[4] An injunction may also be dissolved and vacated at chambers.[5] It is mainly in the extraordinary remedies that there is demand for appealing to a judge at chambers. Any of the courts in Ohio, *or a judge thereof*, may grant a writ of *habeas corpus*,[6] thus authorizing a judge at chambers to allow the writ, conferring authority also to hear it on its merits in vacation.[7] The statute in Ohio does not authorize a judge in vacation to allow an alternative writ of mandamus;[8] but does confer the power upon a judge to appoint a receiver at chambers.[9] With reference to the power of a judge to vacate an order appointing a receiver at chambers, the supreme court has said: "Without determining what may be the authority of the judge at chambers to vacate a receivership when the court making the appointment is in session, so as to allow the application to be made to the court; yet, if during the term there is, by adjournment, such an interval in session as to prevent the application being made to the court without causing

[1] Sec. 18, Art. 4.

[2] Atwood *v.* Whipple, 48 O. S. 312.

[3] R. S., sec. 5573.

[4] Atwood *v.* Whipple, 48 O. S. 312.

[5] R. S., sec. 5584. The term "*or a judge thereof*" is used in the statute. Finegan *v.* Allen, 46 Ill. App. 553.

[6] R. S., sec. 5727.

[7] R. S., secs. 5737, 5741, 5744.

[8] R. S., sec. 6742. Cannot be issued at chambers in N. Y. People *v.* Donovan, 135 N. Y. 82. Proceedings to compel obedience to a writ of mandamus, and to punish the defendant for contempt, must take place before the court, and cannot be heard by judges at chambers. Davis *v.* State, 50 O. S. 194.

[9] R. S., sec. 5587.

injustice by the delay, it is both the right and duty of the judge to act on the application at chambers."[1] A judge in vacation may, for good cause shown, extend the time for filing any pleading;[2] or make an allowance of temporary alimony,[3] or order a sheriff to deliver up a fugitive from justice.[4] A motion for continuance cannot be heard at chambers,[5] nor can an order for a change of venue be so made;[6] nor can a judgment be rendered in vacation.[7] Where a cause, of which the court has jurisdiction, is tried at chambers, by consent of the parties, the judgment rendered therein is not necessarily void, in the absolute sense, for want of a trial in open court.[8]

A judge at chambers may order that two or more actions be consolidated.[9]

Sec. 175. Terms judicially noticed.—The courts will take judicial notice of the terms of courts,[10] and will also judicially notice the day of the month at which the term of the trial court in which the action was brought commenced.[11]

Sec. 176. Lien of judgment.—The lien of a judgment attaches to land within the county where the judgment is entered from the first day of the term at which the same is rendered, excepting judgments by confession, which now only bind the land from the date of its entry.[12] The lien dates from the hour fixed by the judges for the commencement of the term, although the court may have in fact convened at a later day.[13] And where the record is silent as to the hour when the court met, the presumption is that the court met at the hour fixed.[14] A mortgage filed for record on the first day of the term, before the court actually convenes, will prevail against the lien of a judgment recovered at the same term.[15] In order to create a lien from the

[1] Railroad Co. *v.* Sloan, 31 O. S. 1. Cannot be heard at chambers, Walters *v.* Anglo-Am. & Co. 50 Fed. 316.

[2] R. S., sec. 5098.

[3] King *v.* King, 38 O. S. 370.

[4] Sheldon *v.* McKnight, 34 O. S. 316.

[5] Norwood *v.* Kenfield, 34 Cal. 329.

[6] Utsey *v.* Charleston & R. R. Co. 17 S. E. 141 (S. C.).

[7] A judgment sustaining a demurrer cannot be rendered in vacation. Stewart *v.* Stewart, 15 S. E. 23 (Ga.) A judgment of the court, to be valid, must be pronounced by the *court* at a time and place appointed. A judgment is a judicial act, and to be valid must be pronounced by the court, at the time and place appointed by law, and in the form required by law, and in the form it requires. Cooper *v.* Am. Central Ins. Co., 3 Colo. 318.

[8] *Ex parte* Bennett, 44 Cal. 84.

[9] R. S., sec. 5120.

[10] Gilliland *v.* Sellers, 2 O. S. 223, 226; Wilson *v.* Giddings, 28 O. S. 554.

[11] Meriden & Co. *v.* Flory, 44 O. S. 430, 436.

[12] R. S., sec. 5375. Judgments by confession were formerly a lien from the first day of the term. 14 O. 514. See Shourds *v.* Allison, 5 O. N. P. 54. See sec. 898, *post*.

[13] Davis *v.* Messenger, 17 O. S. 231.

[14] Hemminway *v.* Davis, 24 O. S. 150

[15] Follett *v.* Hall, 16 Ohio, 111; Birchard, C. J., dissenting; Holliday *v.* Bank, *Id.* 533. The decision in Follett *v.* Hall, 16 Ohio, 111, and Holliday *v.* Bank, 533, have, to a certain extent, become a rule of property. Hemminway *v.* Davis, 24 O. S. 150. Lien of judgment dates from the first day of the term, and is preferred to the lien of a mortgage executed before, but not

first day of the term at which the judgment is rendered, the judgment must not only be pronounced during the term, but it must be entered on the journal during the term.[1]

Sec. 177. Lapse of term.—In the absence of statutory provision the consequence of the non-attendance of a judge is the lapse or loss of a term.[2] But the court does not thereby lose jurisdiction of a cause, but may proceed with the trial at the next regular term.[3]

Sec. 178. Adjournment of sessions.—The court is authorized to adjourn the sessions from time to time as may be deemed necessary. Where the court, inadvertently, adjourns to a certain day which happens to be a Sunday or other legal holiday, the court may convene on such day and adjourn to another day. A jury summoned for that day may properly be ordered to appear on another day.[4]

recorded until after the commencement of the term. Jackson *v.* Lace, 14 Ohio, 514.

[1] Coe *v.* Erb, 59 O. S. 259. See sec 898, *post.*

[2] *In re* McClasky, 37 Pac. 854 (Okla.).

[3] State *v.* Wells, 54 Kan. 161.

[4] Jones *v.* State, 14 C. C. 35.

CHAPTER VI.

RULES OF COURT.

SEC.
179. Rules of court defined.
180. Legislature cannot prescribe.
181. Power of courts to make.
182. Same, continued—Statutes.
183. What may be prescribed by.
184. Essential requirements.
185. Take effect when.
186. Force and effect of.
187. Construction of.
188. Validity of.
189. Courts to take notice of.

SEC. 179. Rule of court defined.—A rule of court is defined as an order made by a court having competent jurisdiction. They are either general or special; the former are the laws by which the practice of the court is governed; the latter are special orders made in particular cases.

SEC. 180. Legislature cannot prescribe.—The form of the State government is so arranged that the departments thereof, legislative, executive, and judicial, are kept separate and distinct. The legislature may enact general laws for the government of courts, but there is a difference between laws and rules, and the legislature cannot constitutionally prescribe rules and regulations for procedure in the courts. [1]

SEC. 181. Power of courts to make.—Chancery and common-law courts were possessed with inherent or incidental power to frame such rules governing the practice therein as were deemed necessary, without previous legislative authority,[2] so long as they are consistent with the law,[3] and not unreasonable or subversive of the rights of the parties.[4] But this matter has been regulated to a greater or less extent in various jurisdictions by the statute.[5] The court must from necessity have the power to frame such rules as may be deemed best calculated to carry the laws into execution with convenience and dispatch. These rules may be altered at pleasure, as may be found will the better subserve the public good.[6]

[1] Herndon *v.* Insurance Co., 111 N. C. 384. It was said that the legislature may abolish a rule of court. Bishop *v.* State, 30 Ala. 34.

[2] Cochran *v.* Loring, 17 O. 409; Horner *v.* Horner, 145 Pa. St. 258; 3 Pick. 512.

[3] See sec. 188, *post.*

[4] Nutting *v.* Houston, 42 Mo. App. 363. (See sec. 188, *post*).

[5] Stevens *v.* Ross, 1 Cal. 94.

[6] Barry *v.* Rudolph, 3 Binney (Pa.) 277.

Sec. 182. Same, continued—Statutes.—The statute gives the supreme court,[1] the circuit court,[2] the Hamilton county courts,[3] the common pleas[4] and the probate courts power to frame rules for the government of the procedure and practice therein. The probate court must submit the rules framed by it to the supreme court; this court is required also to observe the rules of the common pleas courts as far as the latter may be consistent with the practice in that court.

Sec. 183. What may be prescribed by.—As the rules prescribed by a court cannot contravene laws[5] it follows that they cannot touch upon matters already provided by law, nor can a court add to its power by a rule,[6] or enlarge the effect of statute,[7] though it may supply imperfections in a law.[8] The court may, by rule, prescribe the time for hearing motions and demurrers.[9]

Sec. 184. Essential requirements.—Rules of court partaking of the character of laws governing the practice and procedure in courts, by analogy, therefore, the manner of promulgation must be similar to that of laws. The existence of rules must be brought to the attention of parties litigant and their attorneys. They cannot rest in parol;[10] but should be written and published in some form.[11] In some jurisdictions, statutes exist which require publication. That is not so in Ohio. The usual practice is to have them printed in pamphlet form under the supervision of the clerk, where it is understood they can be obtained; and attorneys are charged with knowledge of their existence and their provisions.[12] Some authority goes to the effect that they should be made matter of record,[13] though it will be sufficient if filed with the clerk.[14] While local counsel are charged with knowledge of the rules of practice prevailing in their own courts, it would be unjust to hold the same rule as to foreign counsel.

Sec. 185. Take effect when.—The rules take effect from the time designated by the court that they shall go into effect.

[1] R. S., sec. 439.
[2] R. S., sec. 451.
[3] R. S., secs. 464, 497.
[4] R. S., secs. 464, 466.
[5] Sec. 188, *post.*
[6] Hudson *v.* Parker, 156 U. S. 277
[7] The Hiram, 23 Ct. Cl. 431.
[8] Cochran *v.* Loring, 17 O. 409.
[9] R. S., sec. 5134.
[10] Owens *v.* Ranstead, 22 Ill. 161.
[11] Owens *v.* Ranstead, *supra;* 10 Ia. 149.
[12] But it is said that neither parties, or their attorneys, are chargeable with negligence in assuming that rules of court practice will be observed and enforced. R. R. Co. *v.* O'Neill, 25 Ill. App. 313.
[13] Owens *v.* Ranstead, *supra.*
[14] State *v.* Ensley, 10 Ia. 149.

Sec. 186. Force and effect of.—Just what force and effect shall be given to rules of court is probably the most important question relating to them. This matter has been considered to some extent by the courts, and there is not entire harmony. The authorities seem to be agreed that they have the force and effect of laws or statutes in the courts adopting them, in a limited sense; that being so, they are binding upon the court and parties.[1] But there is not entire harmony upon the question as to the power of the courts to suspend or disregard a rule in a particular case. Cases are found where it is held both ways, so that we are compelled to draw a conclusion from the side of better reason as we deem it. In the sense that they are considered as "minor laws," governing procedure, they should operate uniformly on like cases; discriminations should not be made between parties whose cases are exactly similar. The rule as laid down by some authorities that a rule "cannot be dispensed with to suit the circumstances of any particular case . . . . but the rule once made, without any such qualifications, must be applied to all cases which come within it, until it is repealed by the authority which made it." And those adopting the similar doctrine,[2] is not believed to be the invariable or universal rule. It is good so far as the facts and circumstances are alike in all cases; but suppose that the facts and circumstances of one case are such that justice should warrant the court in excepting it from the operation of the rule, does not the court, which is possessed of the inherent and incidental power to make the rule, also have the right to make use of the same power and sound discretion to suspend the rule to meet the case? It certainly seems so. As has been well said: "Rules of court are but the means to accomplish the ends of justice, and it is always within the power of the court to suspend its own rules, or to except a case from their operation whenever justice requires

[1] State *v.* Edwards, 110 N. C. 511; Lancaster *v.* Waukegan R. R. Co., 132 Ill. 492; Thompson *v.* Hatch, 3 Pick. 512; Rout *v.* Ninde, 111 Ind. 597, 598; Pratt *v.* Pratt, 32 N. E. 747 (Mass.); Maloney *v.* Hunt, 29 Mo. App. 379.

[2] Thompson *v.* Hatch, 3 Pick. 512. "They never ought to be relaxed or suspended to meet temporary inconveniences, to be accommodated to the ever-varying circumstances of time. There exists in the courts no discretion arbitrarily to dispense with their rules; while in force they should be applied to each and every case falling within them. Courts may modify, change, or rescind their rules, but only in the same manner that a legislature may change or repeal a law." Pickett *v.* Wallace, 54 Cal. 147; Baker *v.* Blood, 128 Mass. 543; Miller *v.* Edgerton, 140 U. S. 690; State *v.* Edwards, 110 N. C. 511; Rout *v.* Ninde, 111 Ind. 597; Pratt *v.* Pratt, 32 N. E. 747 (Mass.). The court has no discretion to disregard them unless it is expressly provided that it may. Hughes *v.* Jackson, 12 Md. 450; 18 La. Ann. 703; 3 Green, N. J. 124; 22 Ill. 161. The supreme court has no power to suspend, in a particular case, the rules of the circuit court in respect to the preparation and settlement of a bill of exceptions, such rules having the force of a statute until abrogated by competent authority. Baker *v.* State, 54 N. W. (Wis.) 1003.

it."[1] Where a rule of the court is not insisted upon by the court or its officers, nor by the party who is entitled to take advantage of it, it has no just application, and will not be allowed to work a disadvantage to the opposite party.[2] So where parties tacitly claim compliance with a rule, the court may, in its discretion, permit them to proceed upon the real merits of the controversy.[3]

Sec. 187. Construction of.—Rules should be construed as statutes are;[4] and the construction is peculiarly within the discretion of the court that made them.[5] The construction placed upon a rule by that court is not final, but may be reviewed by a higher court,[6] but ordinarily only when there is manifest or material error, or when it clearly appears that the rules have been violated.[7]

Sec. 188. Validity of.—The validity of a rule of court, if it is in accordance with the statutes, is not open to question.[8] But any rule not in harmony with the statutory provision or which is in contravention to any doctrine or established general law is invalid.[9] A rule which is unreasonable or oppressive is not valid.[10]

Sec. 189. Courts take notice of.—Being considered as of the nature of rules of law in a limited sense, they are always before the court by which they are framed, and need not be pleaded, nor need they in any way be formally brought to the notice of the court.[11] But this is not so with courts other than those framing them,[12] and must be specially pleaded whenever it is desired to be brought into controversy in another court.[13]

[1] Symons *v.* Bunnell, 20 Pac. 859, 80 Cal. 330; Southern Pac. Co. *v.* Hamilton, 54 Fed. 468; U. S. *v.* Breitling, 20 How. 252; Gillette Herzog Mfg. Co. *v.* Ashton, 56 N. W. 576 (Minn. —); First Nat'l Bank *v.* Post, 25 Atl. 1093. See Martin *v.* De Loge, 39 Pac. 312. The rules of chancery to expedite and facilitate the preparation of suits are not so imperative and inflexible that upon sufficient cause shown the chancellor may not relax them. Beach's Modern Equity Pr., sec. 321, note. Marsh *v.* Crawford, 1 Swan, 116.

[2] Squires *v.* Willett, 31 Ia. 169.

[3] Fisher *v.* Spang, 43 Ill. App. 378.

[4] Hamon *v.* McCue, 43 Cal. 178; Bernal *v.* Wade, 46 Cal. 641.

[5] Bair *v.* Huberett, 139 Pa. St. 96; Baldwin *v.* St. Louis & Co., 75 Ia. 297.

[6] Rathbone *v.* Rathbone, 4 Pick. 89.

[7] Bair *v.* Hubarett, *supra;* Nevin *v.* Morrison, 18 Atl. 636 (Pa.).

[8] Hanson *v.* McCue, 43 Cal. 178. See also 73 Ill. 34; 7 Bis. 463; 9 Ia. 45; 34 Mich. 428.

[9] Wilkinson *v.* Daniel, W. 368; Redman *v.* Slate, 28 Ind. 205; Reist *v.* Heilbrenner, 11 S. & R. 131; People *v.* McClellan, 31 Cal. 101. See also 2 Met. (Ky.) 538; 3 Pick. 512, 514; 9 Minn. 72. *In re* Nau, 20 D. C. 420.

[10] Krutz *v.* Griffith, 68 Ind. 444.

[11] Rout *v.* Ninde, 111 Ind. 597.

[12] Rout *v.* Ninde, 111 Ind. 597; Crotty *v.* Wyatt, 3 Bradw. 388.

[13] *Id.*

CHAPTER VII.

DOCKETS, RECORDS AND PAPERS, AND DUTIES OF OFFICERS.

SEC.
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193. The clerk must keep the records.
194. What books must be kept.
195. The appearance docket.
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199. Record deemed recorded when.
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201. Record in cases taken to higher court.
202. Papers and files admissible as evidence when record not made.
203. Mistakes and omissions in record.
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207. Collateral attack by proof *aliunde*.
208. How orders are taken and made by the court.
209. Requirements and preparation of journal entries.
210. Signing journal entries.
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212. Indices.

SEC. 190. Duties of clerks.—The various provisions of the statutes prescribe the duties of clerks of courts of record, which are entirely ministerial in their character. Those prescribing the duties of clerks of the court of common pleas are so far as possible applicable to clerks of other courts of record.[1] The clerk is required to exercise the powers conferred and to perform the duties enjoined by statute and by the common law ; and in the performance of those duties he is always under the direction of the court.[2] He may be required by the court to correct clerical errors and those arising from fraudulent alteration or mutilation of files or record as well.[3]

The various duties of clerks with reference to filing, indorsing and preserving papers, and making records, are discussed in this chapter.

SEC. 191. Filing, indorsing and preserving papers.—There are two sections in the Ohio code governing this matter. The first[4] provides that : The clerk shall file together, and carefully preserve in the office, all papers delivered to him for that purpose, in every action or proceeding. The second provides that : The clerk shall indorse upon every paper filed with him the date of the filing thereof ; and upon every order for a provisional remedy, and upon every undertaking given under the same, the

[1] R. S., sec. 4964.
[2] R. S., sec. 4965.
[3] Hollister *v.* Judges, 8 O. S. 202.
[4] Sec. 4961.

date of its return to his office.[1] The important question to be determined is when a paper is filed, as the time or date when it is filed may be material to the rights of parties under it. The question is free from difficulty. A paper is considered filed when delivered to and received by the proper officer to be filed, and by him received to be kept in its proper place in his office, whether the indorsement of filing is placed thereon or not. The indorsement of the fact and date of filing is but evidence of filing, although it is not conclusive evidence.[2] It would be extremely dangerous to property rights to make the validity of the filing depend upon the practice of a ministerial officer, regulated by no positive law.

Nor does the validity of the act of filing depend upon the paper being actually lodged in the office of the clerk. It will be considered as a sufficient filing where it is received by the officer outside the office, if it be afterwards deposited in the files of the office.[3] It has been considered objectionable to file a paper on a legal holiday, though special objection on this account must be made.[4] The act of filing is not invalidated by failure to make an entry thereof on the docket, as such omission may be supplied.[5] Necessarily this entry can be supplied only when the act of filing has actually taken place.[6]

Sec. 192. The common law record.—A record at common law consisted of a roll of parchment upon which the proceedings of courts were drawn, which were then deposited in the treasury of the courts. This was called the judgment roll. This has been superseded in the United States by the paper records, which contain in substance what the old judgment rolls did at common law.[7]

Sec. 193. The clerk must keep the records and record proceedings.—The clerk is the ministerial officer of the court, and it is his statutory duty to keep the records, journals, books and papers appertaining to the court, and record its proceedings.[8] Orders made out of court must be entered on the journal in the same manner as orders made in term.[9]

[1] Sec. 4961.

[2] King *v.* Penn, 43 O. S. 57; Haines *v.* Lindsey, 4 O. 88; Thompson *v.* Foster, 6 Ark. 208; State *v.* Gowen, 12 Ark. 62; Hook *v.* Fenner, 32 Pac. 614; 18 Colo. 283; Nimmons *v.* Westfall, 33 O. S. 213. A paper is filed when placed in the custody of the clerk. Lessing *v.* Gilbert, 27 S. W. 751; 8 Tex. Civ. App. 174. Whether strung upon a thread or laid in a drawer or pigeon-hole. Haines *v.* Lindsey, *supra.*

[3] Bank *v.* Batchelder Egg Case Co., 51 Fed. 130; Bank *v.* Same, 51 Fed. 137.

[4] William *v.* Verne, 68 Tex. 414; Cox *v.* Trent, 1 Tex. Civ. App. 639.

[5] Security Co. *v.* Arbuckle Co., 24 N. E. 329.

[6] Winkleman *v.* Winkleman, 44 N. W. 556; 79 Ia. 319.

[7] Hahn *v.* Kelley, 34 Cal. 391.

[8] R. S., sec. 4962.

[9] R. S., sec. 5963.

Sec. 194. What books must be kept.—The clerk of the court of common pleas is required to keep at least five books, to be called the appearance docket, trial docket, and printed duplicates of the trial dockets, for the use of the court and the officers thereof, journal, record, and execution docket, and an index to the trial docket, and the printed duplicates of the trial docket, and journal direct, and to the appearance docket, record and execution docket, direct and reverse.

Sec. 195. The appearance docket.—The statutory requirement with reference to the appearance docket is : The clerk shall enter upon the appearance docket, at the time of the commencement of an action or proceeding, the names of the parties in full, with names of counsel, and forthwith index the case, direct and reverse, in the name of the plaintiff and defendant ; he shall also enter at the time it occurs, under the case so docketed, the issue of the summons, other *mesne* process or order, and the filing of each paper; and he shall record in full the return on such writ or order, with the date of its return to the court, which entry shall be evidence of its service.[1] It has been held that the jurisdiction of the supreme court of a cause in error does not depend upon the docketing by the clerk, and that the same could not be dismissed where it was left with the clerk, but not docketed by him through his neglect,[2] and we presume this would apply to original cases filed in the lower courts.

The object of the entries on the appearance docket is to keep a memorandum of the chronological steps in an action for ready reference, and hence a summary statement by the clerk as to what the prayer and purpose of a petition is, cannot be used as proof of the contents of the lost record.[3]

Sec. 196. The trial docket.—The clerk is required to prepare a trial docket at least twelve days before the first day of each term.[4] This docket serves as a guide for the court in setting cases for trial, and only such cases as have reached an issue should be placed upon this docket,[5] and whenever the issues are made up during a term the same may be placed on the docket.[6] This matter is generally regulated by a rule of court. A very convenient rule is to require counsel to file within a specified time a notice of trial in all cases where the issue has been made up, and from this notice the clerk may determine what cases shall

[1] R. S., sec. 4958.

[2] King *v.* Penn, 43 O. S. 57. See also Snell *v.* D. & S. City Ry. Co., 88 Ia. 442.

[3] Roberts *v.* Briscoe, 1 O. C. C. 577, 586.

[4] R. S., sec. 5132.

[5] See sec. 5135.

[6] *Id.*

be entered upon the trial docket. The statute provides that the clerk shall not place upon the trial docket any case in which nothing remains to be done except to execute an order for the sale of real or personal property, and to distribute the proceeds as directed by the order. If it becomes necessary, the case may be re-docketed, on the application of either party.[1]

The entry of a cause upon the trial docket has not been considered essential to clothe the court with jurisdiction. In other words, the court does not lose jurisdiction merely because the case has been omitted from the docket for a number of years.[2]

And where a decree in foreclosure has been obtained, the fact that the case has been omitted from the docket, as provided by the statute, will not in any wise affect the validity of the decree.[3]

Sec. 197. The bar docket.—The statute requires the clerk to make a copy of the trial docket for the use of the bar before the first day of the term.[4] This docket is made for the court room, but except in the supreme court there is seldom two separate written dockets made out by the clerk, as contemplated by the statute. One docket is made generally for each judge, where there is one or more judges sitting, and what would be termed more appropriately the bar docket is printed so that each member of the bar may have a copy.

Sec. 198. Making complete record—Its purposes and requisites.—The statutory duty of the clerk requires him to make up a complete record of every cause, as soon as the same is finally determined, unless it be waived by the parties;[5] the time when such record is to be made is in the vacation next after the term when the cause is decided.[6] What constitutes the record of a case is of some importance. Very much may depend upon it, more especially upon a reviewal of a cause upon error. Counsel cannot be too careful in having the record show clearly every essential step. The important part in making up the record for the purpose of going to a higher court is in having those matters not apparent on the face of the record itself made part of it by a bill of exceptions.

But we are treating at this point the record generally, that which is apparent, or which constitutes the face of the record, and not the successive steps taken during trial.

It is not a difficult matter to determine how the record shall be made up and what shall constitute the final record, as the

[1] R. S., sec. 5132.

[2] Farmer's College *v.* Cary, 35 O. S. 648.

[3] Moore *v.* Ogden, 35 O. S. 430.

[4] R. S., sec. 5136.

[5] Whittaker's Civ. Code, sec. 5332.

[6] Sec. 5333.

statute is clear and decisive, and the courts have considered the questions most commonly connected with the subject.

The record is a memorial or history of what has been done in the case from its commencement, the issuance of the summons, until final judgment is rendered, copied by the clerk into a book called the complete record.[1]

The purpose of preserving the evidence of what was transacted is for the use and benefit of those interested in the transaction involved, or of others affected thereby.[2]

It is not the transcribing of the various matters constituting the record into the book which gives it validity, as that depends entirely and solely upon the previous action of the court.[3]

The record is considered merely as an evidence of this action;[4] and when made up as required by statute, being evidence only of what was done, there can be no conjecture that other things, not shown by the record, were intended.[5]

The record should be precise, clear and complete, containing proof within itself of every fact on which the judgment rests. It cannot exist partly in writing and partly in parol, and is not, therefore, subject to contradiction.[6]

What constitutes the record of a cause is regulated entirely by statute,[7] and any paper which the statute authorizes to become part of the record may be made part thereof without an express order to that effect.[8] The statute provides that[9] the records shall be made up from the petition, process, the return, pleading subsequent thereto, reports, verdicts, orders, judgments, and all material acts and proceedings of the court, but if items of an account, or copies of papers attached to the pleadings are voluminous, the court may order the record to be made up abbreviating the same, or inserting a pertinent description thereof, or by omitting them entirely. The bill of exceptions shall be filed with the pleadings and papers, but not recorded, unless the court have good reasons for so ordering, and evidence must not be recorded.

It being essential that the record be complete, the facts contained in the record of another case should not be made part of it by reference.[10]

A record necessarily consisting of what was done must include only that which was ordered to be done by order of court, and does not include something voluntarily done by either party.

[1] Chapman *v.* Seeley, 8 O. C. C. 182; Sayles *v.* Briggs, 4 Metc., 423; Newman *v.* Cincinnati, 18 O. 322.

[2] Mitchell *v.* Eyster, 7 O. (Pt. 1) 257.

[3] Mitchell *v.* Eyster, *supra.*

[4] *Id*

[5] Bolles *v.* Stockman, 42 O. S. 445.

[6] Sayles *v.* Briggs, *supra.*

[7] Sec. 5334.

[8] Smith *v.* Board, &c., 27 O. S. 44.

[9] Sec. 5334.

[10] Spangler *v.* San Francisco, 84 Cal. 12.

Voluntary assumptions, though entered on the record, do not make it part thereof.[1]

A demurrer, when filed, becomes part of the record, and judgment upon it should be shown by a record entry, not by a bill of exceptions,[2] and so with a motion for a new trial and judgment thereon.[3] It is only when a motion rests upon matters not apparent upon the face of the record itself that a bill of exceptions is necessary to present it.[4]

Sec. 199. Record deemed recorded when.—As we have seen, the purpose of making the record is to perpetuate the acts of the court as evidence. But the mere fact that a record has not been written will not prevent parties from making use of any part of it in collateral matters. We have heretofore seen[5] that the mere fact that an entry has not been placed upon the journal does not affect its validity, so that where the record of a cause has not been actually made, it is considered that papers, pleadings and entries when filed in a cause become part of and constitute the record as fully as if copied into the record book of the court.[6]

And when all is done to authorize the recording officer to record, it is in law considered as recorded, although the manual labor of writing it in the book kept for that purpose has not been performed.[7]

Even in those cases in which no final record is made, or is required to be made, the order, decrees and minutes of the court are considered as legal evidence and matter of record, if the court was in the exercise of its legitimate power and authority.[8]

Sec. 200. What not appropriately part of record.—The journals and dockets are not complete records, but merely material from which the record is made;[9] nor are minutes kept of the daily proceedings of courts part of the record.[10] Entries in dockets or calendars are not required by law to be kept, and entries made by the judge on his docket are not evidence of what they

[1] Noble *v.* Shearer, 6 O. 426. A transcript from the docket of a justice is not competent evidence on the trial of a cause to prove facts stated therein not required by statute to be entered on the docket. Armstrong *v.* State, 21 O. S. 357.

[2] Gibbs *v.* Dickson, 33 Ark. 107.

[3] Windhorst *v.* Wilhelms, 1 O. C. C. 29.

[4] Freshour *v.* L. & N. Turnpike Co., 104 Ind. 463; The Washington Ice Co. *v.* Lay, 103 Ind. 48; Crumley *v.* Hickman, 92 Ind. 388.

[5] *Ante*, Sec. 198.

[6] Stevison *v.* Earnest, 80 Ill. 513; Harding *v.* Larkin, 41 Ill. 423.

[7] Young *v.* Buckingham, 5 O. 485, King *v.* Kenney, 4 O. 79; Marbury *v.* Madison, 1 Cranch, 161.

[8] State *v.* Dawson, 6 O. 251, 253.

[9] Harvey *v.* Brown, 1 O. 268; Young *v.* Buckingham, 5 O. 485.

[10] *Id.*

contain, but are the mere statements of the persons making them.[1]

Sec. 201. Record in cases taken to higher court.— The record of a cause taken up to a higher court on appeal or error, is not usually made until the case is returned to the court of original jurisdiction. And in taking the case up for reviewal upon error, the original papers of the case may be taken up, or a transcript of them, including the journal entries, may be made, which will constitute the record, except as to the facts which do not appear upon the face of the record, which have to be brought into the record by a bill of exceptions.

Transcripts are made of the record by copying the files and the orders of the court, as entered on record by the clerk.[2] The files and entries may be used for any purpose for which the complete record could be used in lieu thereof, if the latter is not made up.[3] The record in a case taken up to a reviewing court on error, in cases tried to a jury, consists of the pleadings and transcript of journal entries and bill of exceptions. In cases taken up on appeal, it consists of the original papers or pleadings and transcript of journal entries. Parties may agree that the case shall be tried in the appellate court upon the evidence below when it has been taken by stenographer. This is a matter purely of agreement, and the evidence taken in the lower court is not necessarily part of the record.

Sec. 202. Papers and files admissible as evidence when record not made.—As we have heretofore seen, the purpose of making a record of causes is to perpetuate what was done by the court as evidence. But even though the complete record has not actually been made by the clerk, if it is desired to be used as evidence in another action, the various pleadings, papers, docket and journal entries may be used instead of the record.[4]

They may, in fact, be used for any purpose for which the complete record may be used and in lieu thereof.[5]

The original papers and transcripts from the journal entries, both of the supreme and common pleas courts, are admissible in evidence as the record of a cause when they have not been carried into the record book.[6]

Sec. 203. Mistakes and omissions in record.—If the clerk in making up a record should happen to omit any material fact,

[1] Moore *v.* Brown, 10 O. 197.

[2] Schirmer *v.* The People, 33 Ill. 282.

[3] Noble *v.* Shearer, 6 O. 426, Sutcliffe *v.* State, 18 O. 469; Morgan *v.* Burnett, 18 O. 535; State *v.* Dawson, 6 O. 251.

[4] Chapman *v.* Seeley, 8 O. C. C. 179.

[5] *Ante*, Sec. 198.

[6] Sutcliffe *v.* State, 18 O. 469; Morgan *v.* Burnett, 18 O. 535.

which the papers on file or entries or minutes or entries on the journal should show to be in existence, such omission will not in any wise prejudice the party further than to make it necessary for him to have the matter corrected, or put him to the inconvenience of hunting up the proofs.[1]

A complete record has been defined to be a history of what is done, copied by the clerk into a book called the record ; but it is not the actual writing of those things in this book which gives it validity. It is the previous action of the court upon the subject-matter. If, therefore, the clerk should make a mistake it may be corrected by entries made from time to time, which lay the foundation for the complete record.[2] Parties will not be deprived of their rights, even though the clerk fails entirely to make a record, so long as sufficient material or facts can be found in the file and books of the court to show what was done.[3]

Sec. 204. When court may cause records to be completed.—The law authorizes the court, when for any reason the record has not been regularly kept up by the clerk, to cause the same to be recorded within such time as it may direct ; and when so made up, and upon examination is found to be correct, the presiding judge shall subscribe the same.[4]

Sec. 205. When complete records need not be made.—The mandatory statute[5] requiring the clerk to make complete record of every cause as soon as determined, does not apply in criminal prosecutions when the indictment has been, or when the prosecuting attorney has entered the *nolle prosequi* on the indictment. Nor when the action has been dismissed without prejudice, nor where the parties by agreement declare that there shall be no record made.

Sec. 206. Supplying omissions in record.—Where the record, by reason of a clerical error, does not contain some material matter which actually took place, there is no doubt that the same can be supplied or added to the record, by a *nunc pro tunc* entry.[6] The step omitted by the clerk may be shown by the minute book of the court.[7] Upon satisfactory proof, long after a record has been made, a *nunc pro tunc* entry may be made, correcting the record so as to make it conform to the actual orders of court, but the order must have in fact been made,

[1] Mitchell *v.* Eyster, 7 O. (pt. 1) 257.
[2] Newman *v.* Cincinnati, 18 O. 323, 331.
[3] Mitchell *v.* Eyster, *supra.*
[4] R. S., sec. 5335.
[5] Sec. 5332.
[6] Mitchell *v.* Eyster, 7 O. (1st pt.) 257.
[7] Newman *v.* Cincinnati, 18 O. 323.

and in no case should that be added to the record which is not properly a part of it.[1]

Sec. 207. Collateral attack by proof aliunde.—The rule is well settled that records of courts import absolute verity, and cannot be collaterally attacked by proof *aliunde*. Upon an inspection of a record isolated parts should not be looked to for the purpose of determining questions of verity of the record, but the whole record must be permitted to speak, and therefore must be considered for the purpose of determining whether or not it shows the necessary facts to give the court jurisdiction, as well as to make it appear that the proceedings have in all respects been regular and correct. Where a record recites a fact as having been performed, it cannot be presumed that something different was done, or that it was done in a different manner. It will be considered that what ought to have been done was done, and rightly done.[2]

Sec. 208. How orders are taken and made by the court.—Judgments or orders are pronounced orally from the bench, and an entry made by the judge on the court docket, which is the guide for the preparation of the entry; this memorandum by the court is merely an epitome of the judgment or order. When the judgment is pronounced, the papers are handed over to counsel on the successful side for the preparation of the entry. Many orders are made by the court upon request of counsel without contest, as upon default. In such cases, counsel desiring to take the order appears before the court, and when he secures the attention of the judge, announces that he desires to take an order, stating the title and number of the case and the character of the order or judgment desired. If it be a proper order, the court turns to the docket and indorses thereon the order made, and then the entry is made in accordance therewith.

Sec. 209. Requirements and preparation of journal entries.—A judgment is the final determination of the rights of the parties in action, and a direction of a court or judge, made or entered in writing, and not included in a judgment, is an order.[3] All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action.[4] The entry should bear the caption or title and number of the case, and should be prepared by counsel. The usual custom is for counsel in whose favor the order or judgment is made to prepare the entry, who must in turn submit the same to opposing counsel. The entry should be approved by counsel

[1] City of Toledo *v.* Preston, 50 O. S. 361, 369.

[2] Hahn *v.* Kelly, 34 Cal. 391.

[3] Code, sec. 5310.

[4] Code, sec. 5331.

on both sides, and when so approved the clerk is justified in placing it on record without its having the signature of the judge making the order or judgment. It must coincide with the entry made by the court on the bar docket, and in the absence of such an entry the clerk is not justified in placing the journal entry on record, even though it has been approved by counsel. Most all entries relating to the trial by the jury, such as impanelling the jury, continuances from day to day, and the rendition of the verdict, are usually prepared by the clerk. But the entry upon the ruling upon the motion for new trial, stay of execution, and other entries preparatory to error proceedings, as well as entries in the reviewing court, should be prepared by counsel. Entries, however, in the supreme court are seldom if ever prepared by counsel, but are prepared by the clerk, excepting in difficult entries where the judgment is reversed, and the supreme court renders the judgment which the lower court should have rendered which are prepared by the court. All entries in chancery cases are prepared by counsel.

Sec. 210. Signing journal entries.—Under former practice acts, the signature of the judge was essential to the validity of an order or judgment.[1] But this requirement was not carried into the code as to journal entries, although it was as to the final record.[2] And while the better practice may be for the judge making such order to sign it, this has not been considered essential under the present statutes to the validity of an order which has been entered upon the journal by the direction of the judge, as required by statute.[3]

This matter is usually regulated by rules of court. Where counsel on each side have placed their approval on an entry, the clerk may then be safe in placing the same on the journal ; and where that is not the case, then there ought to be an indorsement of approval on the entry, or an order or direction given by the court that the same shall be entered. It is customary practice for the judge to sign the journal at the close of each term of court, and this is commendable practice.

It is not essential to the validity of a judgment that it bear the signature of the judge,[4] as a judgment is, as matter of fact, a valid and binding judgment from the moment it is pronounced by the court, and the entering of the same upon the journal is a ministerial act, and bears only the evidence of the judgment.[5]

[1] Swan's St. (of 1841) 674, sec. 110; Sheehan *v.* Davis, 17 O. S. 571.

[2] *Post*, Sec. 209.

[3] King *v.* King, 38 O. S. 370. See sec. 5331, R. S.

[4] Crim *v.* Kessing, 89 Cal. 479; Gordon *v.* Bodwell, 39 Pac. 1044; 55 Kan. 131.

[5] Estate of Cook, 77 Cal. 220, 227; Clark *v.* Thurston, 47 Cal. 21; State *ex rel v.* Meacham, 6 O. C. C. 31, 34; King *v.* Kenney, 4 O. 83; Marbury *v.* Madison, 1 Cran. 161. But see Coe *v.* Erb, 59 O. S. 259.

Sec. 211. Signing record.—The statute directs that the clerk shall make up the record in each cause next after the term at which the same was determined, and that the same shall be subscribed by the presiding judge.[1] There has been no adjudication by the Ohio courts as to the effect of the failure of the judge to sign the record, though the necessity of signing the journal has been considered. As to the latter, the earlier practice acts made the signature of the trial judge essential to the validity of orders or judgments.[2] But this requirement was omitted in the present code.[3] As before stated, however, it is required that the record, after it is made up, must be signed. The effect of the failure of the judge to sign the record is an open question. The courts of other States have considered the question, some holding that even where the signature of the judge is required, such provision being directory, the failure to sign the record does not render the record of no validity.[4] But the language of our statute seems imperative: "And the presiding judge of the court shall at the next term thereafter, subscribe the same."[5] That this is mandatory would appear from the view taken by the court of language of similar import where the word "shall" is used.[6] Even where the word *may* is used in a statute, it may be construed to mean must or shall in cases where public interests or rights are concerned, or where the public or third persons have a claim *de jure*, that this construction shall be adopted.[7] The words *shall* and *may*, in general acts, are to be construed imperatively.[8] The language being imperative, therefore, must we conclude that the requirement of the statute is essential, shall we say, to the validity of the record for all purposes for which it may be used? Technical strictness might require it, but I am not prepared to say so. The signature adds solemnity and verity, yet where the signature happens to be omitted it would work a hardship where there was no doubt of its validity in all respects save and except the signature of the judge.[9]

Sec. 212. Indices.—The clerk is required to keep an index, direct and reverse, of all judgments, by names of parties alphabetically arranged, showing, in separate columns, the name of

[1] R. S., sec. 5333. When the records have not been brought up and recorded, the court shall cause the same to be made up, and when made up, and upon examination, *shall* subscribe the same.

[2] Swan's St. (of 1841) 674, sec. 110; Sheehan *v.* Davis, 17 O. S. 571.

[3] R. S., secs. 4963, 5331.

[4] Childs *v.* McChesney, 20 Ia. 431; Platte Co. *v.* Marshall, 10 Mo. 345.

[5] R. S., sec. 5333.

[6] Barry *v.* Hovey, 30 O. S. 344, 348.

[7] Malcom *v.* Rogers, 5 Cowen, 193; Sifford *v.* Beatty, 12 O. S. 189, 194; Swazey *v.* Blackman, 8 O. 5, 18.

[8] Campbell *v.* McCormick, 1 O. C. C. 504, 510; Pope *v.* Pollock, 1 O. C C. 347.

[9] See Osborn *v* State, 7 Oh. (Pt. 1st.) 212.

the judgment debtor, the name of the judgment creditor, the amount of the judgment, and the year and term when it was rendered, together with the number of the suit and other matters.[1] The omission of a clerk to properly index a cause, especially in the execution docket, which he is required also to do,[2] might cause serious trouble to the rights of parties, especially if it concerned title to real estate, and would render the clerk liable to damages for negligence.

[1] R. S., sec. 5339.

[2] R. S., sec. 5424.

CHAPTER VIII.

TENDER AND OFFER.

SEC.
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SEC. 213. Definition and object of tender.—When a party has entered into an obligation either to pay money or to deliver goods, or to perform services, and by some outward expression or act in effect tenders or offers to perform the obligation in the manner agreed upon, the law considers that he has, in fact, substantially performed it. A tender is, in fact, an offer either to pay a debt or to perform any other obligation. To be effective, it must be properly made, and even though a tender has been made, the party must continue ready and willing to pay, or perform the obligation, and must have the ability to perform. It is essential that parties should have a full and complete understanding of the exact manner in which a tender must be made, or what will constitute a legal tender, which will be explained later. The object or effect of a legal tender is, that the party acknowledging an indebtedness of the amount tendered, or of an obligation to perform certain acts, and has placed himself in a proper position to take advantage of that tender, is entitled to be protected, or relieved from the payment of any costs, should it be found finally in the trial of the controversy that he is right.

Sec. 214 Effect of tender.—A tender is really an admission of the debt,[1] though it does not extinguish it, but merely stops the running of interest or future damages, and saves cost.[2] There seems to be some little controversy as to the effect of a tender made before the commencement of a suit, which is not followed up by keeping it good by paying the money into court, although there is not much question but that the correct rule of law is that it will not be available as a defense, and will not be effectual to stop interest and prevent costs unless it is paid into court.[3] In one State it is held that where made before the commencement of the suit but is not kept good by the payment of the money into court, it will, nevertheless, stop the running of interest after the date of the tender.[4] Even though it is kept up by a deposit in court it does not constitute a plea in bar, but the party to whom tender is made may recover judgment for the amount admitted to be due ; the tender only affects the question of costs.[5] It may, however, be a full defense where one is seeking to rescind a contract because of the breach by the other party.[6] A tender duly made may be lost by a subsequent demand and refusal.[7]

Sec. 215. In what cases tender may be made.—Our code provides that a tender may be made in the case of a contract for the payment of money, or upon a contract for the payment of any article or thing other than money, or for the performance of any work or labor.[8] This will be discussed in detail in subsequent sections.

Sec. 216. Tender of money on contract.—In an action on a contract for money the defendant may answer and prove that he tendered the amount due thereon before the suit was begun ; and if he pays the clerk at any time before the trial, the amount so offered and tendered, judgment cannot be rendered againt him for more than the money so due and tendered ; and he shall not be liable for any costs, not even his own.[9] Of course, the court or jury must find that the amount so tendered is the correct amount due, for if it was not the correct amount, there cannot be a valid tender.

[1] Wilson *v.* Doran, 17 N. E. Rep. 688 (N. Y.).

[2] Riley *v.* McNamara, 83 Tex. 11; McGuire *v.* Brockman, 58 Mo. App. 307; Halpin *v.* Ins. Co., 118 N. Y. 165, 175; Tiedeman on Sales, sec. 139.

[3] McDaniel *v.* Upton, 45 Ill. App. 151; Halpen *v.* Ins. Co., 118 N. Y. 178; Nelson *v.* Loder, 132 N. Y. 288; Tuthill *v.* Morris, 81 N. Y. 94, 100; Harris *v.* Jex, 55 N. Y. 421; Stow *v.* Russell, 36 Ill. 18.

[4] Raymond *v.* McKinney, 58 Mo. App. 303.

[5] Huntington *v.* Ziegler, 2 O. S. 11.

[6] Bliss Code Plg., sec. 364.

[7] Burlock *v.* Cross, 16 Colo. 162; Walker's Am. Law, 686.

[8] R. S., secs. 5137, 5138.

[9] Whittaker's Civ. Code, sec. 5137.

Sec. 217. Form of answer of tender of money under R. S., Sec. 5137.—Defendant says that on the -- day of ——, 18--, before this action was commenced, he tendered to plaintiff the sum of $--, in payment of the full amount due upon the cause of action set forth in the plaintiff's petition. That the plaintiff refused to accept said amount so tendered. Defendant is still ready and willing to pay said amount so tendered to plaintiff, and has paid said sum of $— to the clerk of this court for said plaintiff, whenever he may see fit to claim the same.

Sec. 218. Tender of articles or labor.—If the action be for the enforcement of a contract for the payment of anything other than money or for the performance of work of any kind, and the defendant answers and proves that he tendered the thing contracted for at the time and place agreed upon, the court or jury shall assess the value of the property or labor so tendered and render judgment for plaintiff in the sum so assessed, but without costs or interest.

But if defendant forthwith performs his contract or gives plaintiff and the court satisfactory assurance that he will perform in a time fixed by the court, then judgment shall be for defendant. In such case, if the performance consist in the tender of a perishable article, it shall be kept at plaintiff's risk and expense.[1]

The transactions which may come under this section are varied. For example: Where certificates of stock are to be delivered on payment of installments, a readiness and willingness to issue the certificates, at the time payment is to be made, is all that can be required.[2]

So where one party refuses to recognize the terms of a contract, or to be bound thereby, it is sufficient in a suit for specific performance, to prove ability, readiness and willingness, without actual tender, according to the terms of the contract, as tender under such circumstances is unnecessary.[3]

Where a deed actually executed by the plaintiff and his wife is tendered to the defendant, both the deed and the tender may be good, although one letter may have been omitted from the wife's signature.[4]

When a party contracted to buy a specified number of hogs, having a certain specified weight, a tender of the requisite number having a weight not less than that specified, it will be sufficient, though the hogs are not those in possession of the vendor at the time of the contract.[5]

[1] R. S., sec. 5138.

[2] James *v.* R. R. Co., 2 Dis. 261. See Halloway *v.* Davis, W. 129.

[3] Bicket *v.* White, 1 C. S. C. R. 170.

[4] Bierer *v.* Fretz, 32 Kan. 329.

[5] Johnson *v.* Pierce, 16 O. S. 472. See Nixon *v.* Nixon, 21 O. S. 114.

A tender of a deed by a part of joint covenantors, with a demand for their share of the purchase money, refused by the plaintiff, does not bar his right to relief. He is entitled to receive a complete conveyance and to make a single payment.[1] A tender should be made where it is desired to rescind a contract,[2] or to sue for specific performance.

Sec. 219. Form of answer of tender of articles under Sec. 5138. —(*Caption.*)—The defendant says that on the — day of ——, 18—, before this action was commenced, at ————, he tendered to the plaintiff all the property mentioned and set forth in said petition, to wit: (state what) which said property the said plaintiff refused to accept. That defendant has ever since and now is ready to fully and completely carry out and perform his part of the contract with reference to said goods, and deliver the same to plaintiff whenever he will accept the same.

Sec. 220. Second tender when first ineffectual.—Where the party who has made a tender, which, through inadvertence or mistake, turns out to be insufficient and ineffectual, he has the right to make a subsequent tender of articles, such as the contract requires, within the time specified, unless the contract expressly provides against it.[3] This necessarily would apply to a tender of money.

Sec. 221. Tender not necessary when.—There are many cases where tender is unnecessary. This may come about from various reasons, especially where it is apparent that it will be fruitless;[4] and in other instances where from the nature of the circumstances it is impossible to make tender.

The law will never require a vain thing to be done. So tender need not be made where the person to whom it is to be made indicates clearly that it will not be accepted,[5] nor where, at the time of the performance of a contract, one party has placed it out of the power of the other to perform;[6] nor where one who is bound to pay, refuses to do so, is it necessary that demand and tender of performance by the person entitled to receive, be made;[7] nor where the party to whom tender is to be

[1] Ohio & M. R. R. *v.* Crary, 1 Disn. 128.

[2] Cain *v.* Guthrie, 8 Blackf. 409.

[3] Coleman *v.* Edwards, 5 O. S. 51.

[4] Enterprise Soap Works *v.* Sayers, 55 Mo. App. 15.

[5] Manhattan Life Ins. Co. *v.* Smith, 44 O. S. 156; Isham *v.* Greenham, 1 Handy, 355, 361; Brock *v.* Hidy, 13 O. S. 310; 2 Disn. 30; Bickett *v.* White, 1 C. S. C. R. 175.

[6] Williamson *v.* Moore, 2 Disn. 30; 1 W. L. B. 285; 3 W. L. B. 114.

[7] Watson *v.* Dun, W. 741.

made cannot be found;[1] nor is it necessary for a vendor to tender the amount paid him where the purchaser makes but one payment and occupies the premises for only such a period as that the amount paid would constitute a fair rental;[2] nor is it essential that a minor refund or tender the purchase money for land sold by him while an infant before repudiating such sale;[3] nor where one party refuses to recognize the terms of a contract for conveyance;[4] nor where by the terms of a contract between an insurer and insured, the company is bound to send the latter a notice of the amount of a premium, but fails to do so.[5]

In proceedings by a mortgagor to set aside a decree obtained by fraud for an amount larger than that legally due, it is not necessary for the mortgagee to tender the amount really due before filing the bill.[6]

Sec. 222. What is good tender—Gold or silver.—What constitutes a good tender is a subject attended with some importance and no little difficulty. Every contract for the payment of money simply is subject to the constitutional power of the government over currency, and the obligation of the parties is, therefore, assumed with reference thereto.[7]

There are several requisites of a valid tender that for the sake of clearness may as well be discussed separately. The validity of a tender may depend upon the manner or mode by which it is made, or upon the medium by which it is offered; as well as the time and place of making it, and to whom it is made. Each of these matters will be discussed in separate sections.

Sec. 223. Same, continued—Manner and mode of tender.—Ordinarily, to constitute a valid tender, the party tendering should have the money at hand, immediately under his control, and must not only be willing and ready, but should actually produce the money and offer to pay it to the other party.[8] It may not, however, always be necessary to actually produce the money in order to render the tender effectual, as the creditor may in some manner make its production unnecessary. He may dispense with such production, or he may do something which is equivalent thereto ; in such case, if the debtor has the

[1] O. & M. R. R. Co. *v.* Crary, 1 Disn. 128.

[2] Higby *v.* Whittaker, 8 O. 198.

[3] Cresinger *v.* Welch, 15 O. 156.

[4] Bickett *v.* White, 1 C. S. C. R. 170; Brock *v.* Hidy, 13 O. S. 306; Bell *v.* Wright, 31 Kan. 236. Nor where the contract is denied. Isham *v.* Greenham, 1 H. 357.

[5] Manhattan Life Ins. Co. *v.* Smith, 44 O. S. 156.

[6] Lockwood *v.* Mitchell, 19 O. 448 (1850).

[7] Longworth *v.* Mitchell, 26 O. S. 334.

[8] Englander *v.* Rogers, 41 Cal. 420; Guthman *v.* Kearn, 8 Neb. 507; Strong *v.* Blake, 46 Barb. 227; Sargent *v.* Graham, 5 N. H. 440; Breed *v.* Hurd, 6 Pick. 356; Bakeman *v.* Pooler, 15 Wend. 637.

money and is ready to produce it, he need not do so.[1] A tender may also be waived.[2] Frequently parties attempt to make a tender without actually producing or showing the money. This will be ineffectual, as it is not a tender for a party merely to say that he has the money in his pocket without showing it,[3] though it might be otherwise where the money is taken part way out of the pocket. Tender may also properly be made where the money is in purses or bags, as that is a useful method of carrying it, with an opportunity to open and examine.[4] Making a deposit in the bank where the note is payable for the purpose of liquidating the same, is not a sufficient tender where the amount is afterwards transferred to the general account of the depositor, unless his balance was at all times sufficient to pay the note,[5] or, unless the same be in some way appropriated to the note.[6] The tender must be entirely free from conditions,[7] though the fact that with a plea of tender into court there is also pleaded a general denial does not render the tender conditional.[8] The amount tendered must also be sufficient to meet the demand, or the amount actually due,[9] although an excess in the amount will not invalidate it,[10] especially if the creditor does not raise objections and can make the change.[11] One of the most important features connected with a valid tender is that it be effectual, or, in the language of the books, kept good. The obligation to keep the tender good is as essential to the legal efficacy of a tender as the offer of the money itself,[12] and this is contemplated by the statute.[13] The whole amount due must be paid into court, and until this is done the former tender will not support a defense against the claim for further interest or cost.[14] Where

[1] Wheeler *v.* Kraggs, 8 O. 173; Bahaly *v.* Hatch, Walker (Miss.) 369, 12 Am. Dec. 570; Guthman *v.* Kearn, 8 Neb. 507; Breed *v.* Hurd, 6 Pick. 356; Hazard *v.* Loring, 10 Cush. 267.

[2] Hazard *v.* Loring, *supra.*

[3] Tompkins *v.* Batie, 11 Neb. 147; Bakeman *v.* Pooler, 15 Wend. 637.

[4] Bahaly *v.* Hatch, 12 Am. Dec. 570.

[5] Riley *v.* Cheeseman, 27 N. Y. Supp. 453.

[6] Myers *v.* Byington, 34 Iowa, 205.

[7] Jones *v.* Shuey, 40 Pac. 17; Odum *v.* Rutledge, &c., Co., 10 So. 222; 94 Ala. 488; Tompkins *v.* Batie, 11 Neb. 147.

[8] Cumdiff *v.* Corley, 27 S. W. 167.

[9] Bodyen *v.* Moore, 5 Mass. 365.

[10] Dean *v.* James, 4 B. & A. 546; 5 Coke, 115; 2 Stra. 916.

[11] Douglass *v.* Patrick, 3 Term Rep. 683.

[12] Burlock *v.* Cross, 16 Colo. 162, 164.

[13] Sec. 5137.

[14] Rosvelt *v.* Bank, 45 Barb. 579; Tuthill *v.* Morris, 81 N. Y. 94, 99, 100; Halpin *v.* Ins. Co., 118 N. Y. 166; Nelson *v.* Loder, 55 Hun, 173; 132 N. Y. 288; Riley *v.* Cheeseman, 27 N. Y. Supp. 453; McCalley *v.* Otey, 15 So. 945, Ala.; Deason *v.* Ins. Co., 63 N. W. 673 (Ia.). To constitute a technical tender the money should be brought into court. Armstrong *v.* Spears, 18 O. S. 373. When money is paid into court it must include the interest on the amount admitted to be due. W. D. Wilson Printing Co. *v.* Ford, 26 N. Y. Supp. 538. When it is sought to be the basis for affirmative relief, it must be paid into court, so that the creditor may get the money, and that fact must be alleged in the pleading. It then becomes the creditor's money, and the debtor cannot dispute his right to it. Halpin *v.* Ins. Co., *supra;* Becker *v.* Boon, 61 N. Y. 322; Tuthill *v.* Morris, 81 N. Y. 100; Storer *v.* McGaw, 11 Allen, 527.

the thing to be tendered is something other than money, or an act is to be performed, some assurance may be given to the court that the same will be delivered or the act will be performed.[1]

Sec. 224. Same, continued—Medium of tender.—Gold and silver coin are made legal tender by the United States Constitution, and the States are prohibited from making anything but this coin a legal tender.[2] The rule adopted in America as to what shall constitute a valid legal tender has been patterned after the English rule. There the current coins of the realm were held to be a valid tender. Silver and bronze coins are also made by statute a legal tender for certain amounts, as well as bank notes payable to bearer or on demand.[3] So in the United States a valid tender on a money demand must be made in gold or silver or in such money as by law is made to constitute a legal tender.[4] Since the passage of the legal tender acts, United States treasury notes are made a valid tender;[5] and so will current bank notes constitute a valid tender where they are the common currency of the country unless objected to on account of the medium.[6] Of course, parties may stipulate that payment shall be made in gold coin, in which case gold only will answer as a valid tender.[7] But in the absence of any express stipulation, as to description, in contracts for the payment of money generally, the court may step in so that such contract may be satisfied by the tender of any legal money.[8] A check, though not a cash medium of payment, nor a legal tender,[9] in the absence of an objection on account of the medium of payment, may constitute a tender the same as money;[10] so returning a check with the objection that the amount is not sufficient is a waiver of the form in which it is made.[11] A tender by check is good, however, where the money is subsequently paid into court.[12] It is not necessary to constitute a valid tender that the party tendering must actually count out the money, as showing and offering it will be sufficient.[13]

[1] R. S., sec. 5138.

[2] Art. 1, sec. 10; Walker's Am. Law, p. 686.

[3] 5 Lawson's R. R., sec. 2531; Leake on Contracts, 863.

[4] People *v.* Cook, 44 Cal. 638; Jones *v.* Mullinix, 25 Ia. 198. Trade dollars are not legal tender. The coins are legal tender when they are of their proper weight.

[5] Knox *v.* Lee, 12 Wall. 457; Longworth *v.* Mitchell, 26 O. S. 334.

[6] Jennings *v.* Mendenhall, 7 O. S. 258; Wheeler *v.* Kraggs, 8 O. 172.

[7] McGoon *v.* Shirk, 54 Ill. 408; 5 Am. Rep. 122.

[8] Butler *v.* Howitz, 7 Wall. 260.

[9] Cady *v.* Case, 39 Pac. 375; Collier *v.* White, 6 So. 618 Miss. (a certified check).

[10] Raymond *v.* McKinney Brothers, 58 Mo. App. 303.

[11] Dale *v.* Richards, 21 D. C. 312.

[12] Wright *v.* Robinson, &c., Co., 32 N. Y. Supp. 463.

[13] Wheeler *v.* Kraggs, 8 O. 169, 172; Walker's Am. Law, p. 686, says: "It is also held that the money need not be

Sec. 225. To whom tender may be made.—A tender may be made to any one who has authority to receive it for the creditor,[1] as to an attorney to whom a claim is intrusted for collection,[2] or to a clerk,[3] or to a husband for his wife,[4] but not to a servant.[5] A tender may be made to one of several partners or joint contractors.[6]

Sec. 226. Time and place of making tender.—If it is stipulated that money is to be paid or that goods are to be delivered at a particular time and place, it is essential to the validity of a tender, that the conditions be complied with.[7] A creditor not being bound to receive money before it is due, a tender is necessarily of no avail if made before due.[8] It may be made at any time, however, on the day it is due.[9] A tender on Monday may be available where the debt is due on Sunday.[10] There may be a waiver as to time and place either expressly or by implication.[11] The contract may be varied or changed so that the thing shall be delivered on another day than that originally provided for, and a tender made in accordance with the change will be good.[12]

Sec. 227. Tender during suit.—It seems to be assumed by some authorities that a tender may be made after the commencement of a suit, as it is held that when made during the pendency of a suit it must include the costs that have accrued up to the time of making the tender,[13] as well as the interest then due.[14] The decision in Ohio was under a statute that authorizes a tender, or rather a deposit to be made in court, which was considered as a tender, during the pendency of a suit. The statutes as they now stand do not so provide, the two sections, permitting a tender of money and articles or labor, contemplate that the tender shall have been made some time

actually produced and counted unless that be insisted upon."

[1] King *v.* Finch, 60 Ind. 420; 1 Eng. Com. Law, 114.

[2] Salter *v.* Shove, 62 N. W. 1126; 60 Minn. 483; Jackson *v.* Crafts, 18 Johns. 110; 10 Eng. Com. Law, 271.

[3] Oatman *v.* Walker, 33 Me. 67.

[4] Conrad *v.* Trustees, 64 Wis. 258.

[5] Jewett *v.* Earl, 53 N. Y. Super. 349.

[6] 3 T. R. 683.

[7] Wiggin *v.* Wiggin, 43 N. H. 561; 80 Am. Dec. 192.

[8] Moore *v.* Kime, 43 Neb. 517; Abshire *v.* Corey, 15 N. E. 685; Ind. ; Mitchell *v.* Cook, 29 Barb. 243.

[9] McClarty *v.* Gokey, 31 Iowa, 505.

[10] Barrett *v.* Allen, 10 O. 426; Salter *v.* Burt, 20 Wend. 205.

[11] Bates *v.* Benninger, 2 C. S. C. R. 568.

[12] Frazier *v.* Cushman, 12 Mass. 277.

[13] Burt *v.* Dodge, 13 O. 131; McDaniel *v.* Upton, 45 Ill. App. 151; Collier *v.* White, 6 So. 618; *cf.* Foote *v.* Palmer, W. 336. In the case of Burt *v.* Dodge, the deposit was made on motion of the party under a statute (Swan's Stat. 660, sec. 61) providing that the defendant may make a deposit during the pendency of a suit, and the deposit was made upon motion under this statute, which seemed to expressly authorize a deposit to be made during the pendency of the suit.

[14] Frances *v.* Deming, 59 Conn. 108.

before the commencement of the suit, and if it be desired to admit the amount of money due, the defendant may, under another section, offer to confess judgment in open court.[1] In New York it has been held that in order to make a valid tender that will stop interest and costs, the purposes for which the tender is made, the money must be paid into court before the trial.[2]

Under the earlier common law, a tender had to be made before suing out the writ,[3] and the plea stated that the tender was made before the commencement of the suit.[4] And it is said that no instance can be found in the practice of the common law courts in which a tender made subsequent to the commencement of the action has been countenanced as a ground for a plea of tender. But there arose very early at common law a practice of permitting, after the commencement of an action, an amount of money, at the discretion of the defendant, to be paid into court. This practice was introduced originally for the purpose of evading the difficulty of proving a technical tender.[5] The practice of allowing money to be paid into court after the commencement of an action upon a contract for the payment of money, was first introduced in England during the reign of Charles II. And this practice, borrowed from England, prevails in this country.[6] When money was paid into court during the pendency of an action, it was usually paid in under a rule obtained from the court, which was in effect a tender, although no tender had formally been made before suit, it was not so called, and none had been pleaded. If the money be paid into court without a rule it may be disregarded by the plaintiff.[7]

A payment of money into court in this manner, however, does not rest upon tender at all, for money can be paid into court where no tender has been made, or after the commencement of an action.[8] So that the author is inclined to the view that in the event a tender has not been made before the commencement of a suit, a tender, strictly speaking, cannot be made during the pendency of a suit in the absence of a statute expressly authorizing it, though a deposit may be made under a rule, as already stated, yet there is doubt whether the latter course may be taken in Ohio, in view of the fact that the statutes authorize another method. If there has not been a valid

[1] R. S., sec. 5141.

[2] Becker *v.* Boone, 61 N. Y. 317; Halpin *v.* Ins. Co., 118 N. Y. 165.

[3] Bacon's Arb. "Tender," Tit. D.

[4] 3 Chitty's Plg., p. 921.

[5] Levan *v.* Sternfeld, 25 Atl. 854; 55 N. J. L. 41; 1 Tidd. Practice. 542.

[6] Boyden *v.* Moore, 5 Mass. 366; Williams *v.* Ingersoll, 12 Pick. 345; Wright *v.* Behrens, 39 N. J. L. 413. The statute expressly authorizes it in Mass. Pub. Sts. C. 168, secs. 24, 25;

[7] Levan *v.* Sternfeld, 25 Atl. 854; 55 N. J. L. 41; 1 Sellon's Pr. 18, 277; Baker *v.* Hunt, 1 Wend. 103.

[8] Levan *v.* Sternfeld, *supra.*

tender made and a defendant desires to admit what he claims to be due, he may take advantage of the statute authorizing or permitting him to offer to confess judgment in open court.[1]

Sec. 228. Pleading tender.—At common law[2] and under the code, to take advantage of tender it must be pleaded; evidence showing a tender cannot be introduced unless it be averred.[3] And where it is desired to keep the tender good, the pleading must contain an allegation that the money is now tendered in court, so that it appears by the pleading that all has been done to entitle the party to the benefit of the tender. It should also be alleged that the tender was made before the commencement of the action.[4] In alleging a tender of performance, the day on which it was made may be essential, and should, therefore, be set forth.[5] A plea of tender of a deed should either set out the deed or make profert of it.[6]

Sec. 229. Equity will not aid a tender.—If a tender is not legal, a court of equity will not support it; nor will it supply a defect of a tender against a rule of law, unless perhaps where fraud is used to prevent it.[7]

Sec. 230. Offer to confess judgment before action.—A party is authorized by statute before an action for money is brought against him, to go into the court of the county of his residence, or of that in which the person having the cause of action resides which would have jurisdiction of the action, and offer to confess judgment for a specified sum upon such cause of action. If the other party has had notice of the offer, of its amount, and of the time and place of making it, but fail to attend to accept the confession, or attending, refuse to accept it, and afterwards commence an action in which he fails to recover more than the amount so offered to be confessed, he must pay the costs of the action.[8]

Sec. 231. Form of notice of offer to confess judgment before action.—*To A. B.*——

You are hereby notified that the undersigned, as authorized by Sec. 5138 of the Revised Statutes of Ohio, will, on the ——

[1] Judge Swan says: "But if no legal tender is made before the commencement of the suit, the defendant may offer to allow judgment to be taken for a certain amount and costs." Swan's Treatise, p. 808.

[2] 2 Saunders Pl. & Ev. 1041.

[3] Sidenberg *v.* Ely, 90 N. Y. 257, 266; Hegler *v.* Addy, 53 Cal. 597.

[4] Levan *v.* Sternfeld, 25 Atl. 854; 55 N. J. L. 41.

[5] Vance *v.* Blair, 18 O. 532; Rains *v.* Scott, 13 O. 107.

[6] Taylor *v.* Browder, 1 O. S. 189, 225.

[7] Gammon *v.* Stone, 1 Ves. Sr. 339; King *v.* Finch, 60 Ind. 423.

[8] R. S., sec. 5139.

day of ——, 19—, at —— o'clock —m., go into the court of common pleas of —— county, Ohio, (before His Honor, Judge ——) and offer to allow and confess[1] judgment for the sum of $—— against me in your favor upon [*state nature of claim*]. Respectfully, C. D.

Sec. 232. Journal entry of offer to confess judgment before action. —The party offering to confess judgment in accordance with Sec. 5138, before the action commenced, when he has served the notice contained in the last section, may then attend, and offer to confess judgment as therein provided, when the following entry may be made:

(*Caption.*)

This day came A. B., a resident of this county, and it having been made to appear to the court that the said A. B. has caused the said C. D. to be properly served with reasonable notice to the effect that he would at this date and hour appear in this court and offer to confess judgment in favor of the said A. B. upon a certain contract, etc. [*or, whatever the transaction may be, set it out fully and particularly*], the said C. D. thereupon appeared in open court and offered to confess judgment in favor of the said A. B. upon said contract for the sum of $—— ; but the said A. B. failed to attend to accept said confession, [*or*, and the said A. B., being present when said offer to compromise was so made, declined and refused to accept the same].[2]

Sec. 233. Offer to confess out of court.—A defendant in an action for money only, may at any time before trial serve an offer in writing to allow judgment to be taken against him for the sum therein specified. The plaintiff may accept the offer any time within five days after the service of the offer in writing by the defendant. This he may do by giving notice of his acceptance to the defendant or his attorney; he must file his notice of acceptance together with an affidavit that the notice of acceptance was delivered within the time limited. Or the defendant may file the acceptance, with a copy of the offer, verified by affidavit. In either case, no matter which party files the notice of acceptance, the offer and acceptance shall be noted in the journal, and judgment rendered accordingly. If the notice of acceptance is not given within the proper period, the offer is deemed withdrawn. If the offer is not accepted and the plaintiff fails to obtain judgment for more than was offered by the defendant, he must pay the defendant's costs from the time of the offer.[3] It is not

[1] Using the word "confess" for "allow in the notice will not invalidate the offer.

[2] The notice may be given in advance of the making of the offer, and produced with proof of its service at the time of making the offer.

[3] R. S., sec. 5140.

sufficient to allege either the offer to compromise[1] nor the "offer to confess judgment in open court,"[2] in the answer. The former must be in a separate writing to be served on plaintiff or his attorney; the latter, in open court, in the presence of plaintiff, or in pursuance of the notice to him as prescribed in Sec. 5141.[3] A notice stating that "the plaintiffs are hereby notified that the defendants offer to confess judgment in favor of the plaintiffs for the sum of three hundred and fifty dollars, and costs of suit to this date," is sufficient to relieve defendant from the costs subsequent to the notice. It is not an offer to confess at any time in the future, nor does it mention that it would be made "in open court" under a subsequent provision.[4]

Where one of several defendants, in an action for money only, offers to confess judgment for a certain sum, under this section, which is not accepted, and the plaintiff fails to recover more than was offered, such defendant is entitled to judgment against plaintiff for his costs from the time of such offer.[5]

Sec. 234. Offer to confess in open court.—The defendant in an action for the recovery of money may offer in court to confess judgment for part of the amount claimed, or part of the causes involved in the action, whereupon, if the plaintiff, being present, refuse to accept such confession of judgment, in full of his demands against the defendant in the action, or having had such notice that the offer would be made, of its amount, and of the time of making it as the court deems reasonable, fail to attend, and, on the trial, do not recover more than was so offered to be confessed, and the interest thereon from the date of the offer, such plaintiff shall pay all the costs of the defendant incurred after the offer was made.[6] The offer which this section contemplates, to be effectual, must be made in open court, and cannot be done by merely placing a written offer on file with the papers in the case. An offer made in that way is not helped by reason of the fact that the plaintiff has knowledge of it.[7] The only way that an offer to confess can be made effectual under this section is either by making it in open court when the plaintiff is actually present, or by serving notice upon the plaintiff that the offer will be made at a certain time in open court.[8] This provision is also applicable to practice before justices of the peace. And where an offer has been properly

[1] R. S., sec. 5140.

[2] R. S., sec. 5141.

[3] Armstrong *v.* Spears, 18 O. S. 373; Tipton *v.* Tipton, 49 O. S; 364, 369. Such averment tenders no proper issue calling for proof at the trial. Evidence of it is forbidden by sec. 5142. *Id.*

[4] Adams *v.* Phifer, 25 O. S. 301.

[5] Railroad Co. *v.* Clark, 54 O. S. 509.

[6] R S., sec. 5141.

[7] Fike *v.* France, 12 O. S. 624.

[8] Adams *v.* Phifer, 25 O. S. 301.

made to confess judgment while the case is pending before the justice, if the plaintiff do not recover on appeal more than was so offered, judgment should be rendered against him for defendant's costs accruing after the date of such offer.[1]

Sec. 235. Offer to confess does not affect trial.—The statute specially prohibits an offer to confess judgment in any of the ways authorized from being deemed as an admission or given in evidence, or mentioned on the trial.[2] It would be improper for counsel to state anything with reference to it to the jury.[3]

Sec. 236. Form of notice of offer to confess judgment.—

To A. B.:

You will take notice that in the above entitled action I will allow judgment to be taken therein against me for the sum of ——— dollars, with interest from ———, 19—, together with all costs that have accrued up to the date of the acceptance of this offer. You will please notify the undersigned whether or not you will accept this offer within five days from the date of this service upon you.

Dated this — day of ———, 19—. C. D.

Affidavit of Service:

State of Ohio, ——— County, ss.:

C. D., being first duly sworn, says that he served a true and correct copy of the foregoing notice upon the said A. B. on the — day of ———, 19—.[4]

Sec. 237. Journal entry of offer to allow judgment out of court.—This day came C. D., the defendant herein, and filed herein a written notice of an offer made by him to confess judgment against himself in favor of the plaintiff herein for the sum of ——— dollars, with interest from the — day of ———, 19—, and the court being satisfied that the said notice has been properly served upon said plaintiff, to wit, on the — day of ———, 19—, and the said A. B. having failed to accept said offer within five days from the date of the service of the same upon me, the said offer is therefore deemed withdrawn.

Sec. 238. Journal entry of offer to confess judgment in open court.—This day came C. D., the defendant in the above enti-

[1] Courtright *v.* Staggers, 15 O. S. 511; Cohoon *v.* Kineon, 46 O. S. 590, 593.

[2] R. S., sec. 5142.

[3] Union Cent. Life Ins. Co. *v.* Cheever, 36 O. S. 201.

[4] R. S., secs. 5141, and 5140. It may be changed to suit either section.

tled action, and offered in open court to confess judgment against himself in favor of the plaintiff herein, upon the cause of action set forth in the said plaintiff's petition, for the sum of ——— dollars, together with the costs accrued at this date; and the said A. B., plaintiff, being present in court refused to accept such confession of judgment.

CHAPTER IX.

CONSOLIDATION OF ACTIONS.

SEC.
239. When actions may be consolidated.
240. Motion to consolidate.

SEC. 239. When actions may be consolidated.—When two or more actions are pending in the same court, the defendant may, on motion, and notice to the adverse party, require him to show cause why the same shall not be consolidated ; and if it appear that, at the time the motion is made, the actions could have been joined, and if the court, or a judge thereof, find that they ought to be joined, the several actions shall be consolidated.[1] This provision applies only where the actions are prosecuted on behalf of the same plaintiff.[2]

SEC. 240. Motion to consolidate.—Now comes the defendant A. B., and represents to the court that there is pending an action in this court, wherein the plaintiff in the above entitled action is plaintiff and this defendant is defendant, said cause being entitled [*give style of case*], and is numbered —; that said two actions could have been joined in one action at the time they were commenced. Defendant therefore moves the court for an order directing the said plaintiff herein to show cause why the said two actions shall not be consolidated.

————————, *Attorney.*

[1] Code, sec. 5120.

[2] Burckhardt *v.* Burckhardt, 36 O. S. 261, 281.

CHAPTER X.

THE ISSUE—HOW TRIED.

SEC.
241. Issue defined—Kinds of.
242. Issue of law arises how.
243. Issues of fact arise how.
244. Issues—How tried.
245. Issues not raised by the pleadings cannot be submitted for trial.
246. Trial, defined.
247. Mode of trial has not been changed by code.
248. Mode of trial in four classes of cases.
249. Trial where legal and equitable cause of action are united.
250. Trial of single cause of action calling for legal and equitable relief—Paramount relief rule.
251. Trial of foreclosure suits.
252. Trial where it is difficult to determine whether or not the cause of action is legal or equitable.
253. What effect does the defense have upon the method of trial.
254. Trial where defendant sets up a counter-claim or set-off

SEC. 241. Issue defined—Kinds of.—Issues arise on the pleadings where a fact, or a conclusion of law, is maintained by one party and controverted by the other. They are of two kinds: 1. Of law; and 2, Of fact.[1]

The issues contemplated by the code are those which arise upon the pleadings, and do not relate to controversies involved in summary proceedings.[2]

SEC. 242. Issue of law arises how.—An issue of law arises upon a demurrer to the petition, answer or reply. The common law practice required issues of law to be disposed of before the trial of issues of fact, and that rule was incorporated into the practice act of this State in 1831. All issues, whether of law or of fact, must be disposed of before judgment.[3] All issues raised upon demurrer should of necessity be disposed of before issues of fact are taken up for disposition by court or jury. But there are innumerable issues of law that can only arise upon the trial, which can only be disposed of as the testimony is deduced. There are many nice questions which arise during trial whether an issue evolved by the evidence is one of law for the court or of fact for the jury. These matters are discussed at another place.[4]

[1] Code, sec. 5128.

[2] Railway Co. *v.* Thurstin, 44 O. S. 525, 528.

[3] Ohio, &c., *v.* Cowles 5 O. S. 88.

[4] See Ch. XXII., "What Should be Submitted to Jury."

Sec. 243. Issues of fact arise how.—An issue of fact arises where a material allegation in the petition is denied by the answer, or where all gations in the answer setting up a set-off, counter-claim, or new matter, is denied in the reply, or upon material matter in a rep y, which is deemed controverted by the defendant without further pleading.[1] By denial is meant a general or special denial.

Sec. 244. Issues, how tried.—Issues of law are tried to the court, unless referred, the court being authorized to refer *any issue*.[2] Issues of fact under the code are tried in precisely the same manner that they were under the former practice. Issues of fact arising in actions for the recovery of money only are tried to a jury. This embraces the common law actions of *assumpsit*, covenant, debt, case. Issues in actions for the recovery of specific real (ejectment at common law) or personal property (replevin) are also tried to a jury.[3] All other issues of fact, which embrace or include all issues in suits in chancery, are tried to the court, subject to its power to order any issue to be tried by a jury or referred.[4]

Sec. 245. Issues not raised by the pleadings cannot be submitted for trial.—It is well understood that parties cannot by agreement change or vary the mode of judicial proceedings; issues must be tendered by the pleadings and not by agreement or consent of parties.[5]

Sec. 246. Trial defined.—A trial is defined by the code as "a judicial examination of the issues, whether of law or of fact, in an action or proceeding."[6] It has reference to a trial upon a plea in bar. It commences within the meaning of certain statutes with the impaneling of the jury, and embraces questions raised while impaneling the jury, also questions as to the admissibility or exclusion of evidence, refusals to charge and the charge given, and ends with the judgment or sentence.[7] Trial, as used in some senses, does not extend to a hearing on motions, or plea in abatement.[8]

Sec. 247. Mode of trial has not been changed by code.—The mode of trial formerly prevailing in the two classes of actions in law and equity was a matter which the code commissioners had

[1] Code, sec. 5129.
[2] Code, secs. 5130–31.
[3] Code, sec. 5130.
[4] Code, see. 5131.
[5] Gittings *v.* Baker, 2 O. S. 21; Boggs *v.* M. M. Co., 14 Cal. 279.
[6] Code, sec. 5127.
[7] Wagner *v.* State, 42 O. S. 537; Hartnett *v.* State, 42 O. S. 568; Palmer *v.* State, 42 O. S. 596.
[8] Railway Co. *v.* Thurstin, 44 O. S. 525.

to consider and provide for in the preparation of the code. The forms of action have been abolished, and it has been provided that those actions which were formerly administered by separate and independent tribunals may now be united without changing the method of trial as it existed formerly. All actions falling under the provision of the code[1] which enumerates in what cases the right of trial by jury shall be had, are exactly the same as they formerly were, to wit: the old common law actions—*assumpsit*, debt, covenant, replevin, ejectment, etc. Issues in all other cases, or all other issues, are tried to the court.[2]

Sec. 248. Mode of trial in four classes of cases.—The right of trial by jury was not thus impaired, as that could not be done, but it was secured in some cases where it was not before enjoyed. The question as to what issues shall be tried to a jury and what shall not is sometimes troublesome to practitioners. The only inconvenience which has been caused by the consolidation of law and equity is in deciding upon the mode of trial. Although the distinction between law and equity has been uniformly maintained, and, although actions at law and equity are tried in the same court, the method of trial in the two classes of actions is as distinct as before the consolidation. There are four classes of cases to be considered in determining the mode of trial,—(1) where a legal and equitable cause of action are united in the same petition, and (2) where the facts constituting a single cause of action call for two kinds of relief, legal and equitable, and (3) where it is difficult to determine whether or not the cause of action alleged is purely equitable or of a legal character, and (4) where the cause of action is itself either legal or equitable, but facts are alleged by the defendant, which, if substantiated, extinguish plaintiff's cause of action, so that the only judgment that can be rendered is either legal or equitable, and directly contrary to the plaintiff's cause of action.

Sec. 249. Trial where legal and equitable cause of action are united.—Causes of action, it will be remembered, cannot be united unless they arise out of the same transaction, or unless they fall within some of the enumerated classes, so that we can thus see that the causes of action are not strangers to each other; they either arise out of the same transaction or sustain some other close relation. But this does not aid in determining the method of trial.

If a legal and an equitable cause of action be united in the same petition, the parties have an absolute right to demand a

[1] Sec. 5130. [2] Code, sec. 5131.

trial by jury of the issues of fact in the legal cause of action, which cannot be taken away or abridged by the legislature.[1] We are led to inquire, if the foregoing statement be correct, what is gained by joinder of such causes of action in one petition, if there has to be a separate trial for each cause of action? Parties may, and usually do, agree that the two causes will be tried together and at once. But even though they do not agree, the court is authorized by the code[2] to order any issue in an equitable action to be tried by a jury, and if the parties demand a trial by jury upon the issues of fact in the legal cause of action, the court may then refer the whole case to the jury.

In cases where there are two causes of action united in one petition, in the foreclosure of liens, at least, where it is not sought to enforce the legal cause of action only so far as it is necessary to enforce the equitable acuse of action, the rule which is logically applicable to single causes of action calling for two kinds of relief, that the nature of the action and the consequent method of trial, is determined by the paramount relief, may be applied. But it is doubtful whether this rule should be applied to any other class of cases where there are two causes united, unless the granting of relief upon one or the other causes of action depends upon whether or not relief is granted on the other. If reformation of an instrument and for judgment thereon as reformed be considered as two causes of action, which finds some support in the authorities, but is not generally so considered, it would furnish a proper case for the application of this rule.

This branch of the subject will be left by the author with the statement that, if two causes of action be encountered, one of which is incidental to the other, then the rule that the method of trial is governed by what is the paramount relief applies.

Sec. 250. Trial of single cause of action calling for legal and equitable relief—Paramount relief rule.—Where the facts constituting a single cause of action call for both legal and equitable

[1] Rowland *v.* Entrekin, 27 O. S. 47. (The relief in this case invoked the equity powers of the court. Plaintiff sought the reformation and perfecting of a lease defectively executed. Scott, J., said: "The case is to be distinguished from one in which a plaintiff unites in the same action causes for equitable relief, and an independent cause of action for the recovery of money only, in regard to which, if issues of fact be joined, a jury may of right be demanded for their trial.")

Ladd *v.* James, 10 O. S. 438. (This was a cause of action for personal judgment on the note, and foreclosure. The court said: "Where an action is brought upon a note and upon a mortgage given to secure its payment, and a judgment is asked upon the note, and for the sale of the mortgaged property, any issue of fact which affects the judgment upon the note is an issue which either party has a right to demand that it shall be tried by a jury.")

[2] Sec. 5131.

relief, the method of trial in such cases is determined by the nature of the action. In all such cases one kind of relief will be primary or paramount and the other will be incidental. If the primary or paramount relief be equitable relief, and the legal relief only incidental, that is, if it is necessary to determine whether plaintiff is entitled to the equitable before the legal relief can be granted, then it is an equitable action, and triable to the court without a jury. And if the paramount relief is legal and the equitable relief only incidental, it is a jury case. An extended review of cases supporting this proposition is made in the note.[1]

Sec. 251. Trial of foreclosure suits.—Foreclosure proceedings should probably be separately classified, for in such an action there are two causes of action, and not a single cause of action calling for two kinds of relief. The rule that the paramount relief determines the nature of the action, and the mode of trial should, in the opinion of the author, ordinarily be limited to single causes of action calling for double relief. It is doubtful whether any other action containing two causes of different

[1] Ellsworth *v.* Holcomb, 28 O. S. 66. (Was a single cause of action for reformation of a contract, and at the same time asking for a money judgment. Held not a jury case.) Rowland *v.* Entrekin, 28 O. S. 47. (Was a single cause of action for reformation of lease and for damages. Held not a jury case.) Brundridge *v.* Goodlove, 30 O. S. 374. (Was a single cause of action for breach of contract, damages, and to restrain defendant from further violation and praying for perpetual injunction. Held, That the action, though equitable relief was sought, being primarily for money and personal judgment, it was a jury case.)

Chapman *v.* Lee, 45 O. S. 356. (This case was held to state primarily a legal cause of action, and an accounting only incidental, and supports the text. It was a charge of fraudulent combination between the defendants, whereby the plaintiffs were deceived, and asking to have a lien upon a contract enforced, and for judgment upon an accounting of money, &c. It would seem that the paramount relief certainly was equitable, because the amount of money for which judgment was finally to be rendered was uncertain until an accounting was had.)

Averill Coal & C. C. Co. *v.* Verner, 22 O. S. 372. (Was an action for balance due on contract for services, and for money loaned, and involved numerous items and accounts. Held a jury case, notwithstanding the complicated accounts.)

Fleming *v.* Kerkendall, 31 O. S. 568. The prayer of the petition was: "That said mortgage may be foreclosed, the premises ordered to be sold, and the proceeds applied to the payment of the debt, and execution awarded for the balance, and for a personal judgment against John Fleming." The defendant, K., was a subsequent purchaser of the mortgaged premises, and did not assume the debt to plaintiff, and the only object of the suit against him was to foreclose his equity of redemption by the sale of the property. K., the defendant, answered, setting up payment of the indebtedness by the original owner. This, if true, would have ended the case and the right to foreclose, but the court held that the controversy between the present owner and the plaintiff was of an equitable nature, and that the prayer for personal judgment against the original owner was merely incidental to the principal relief sought. The decision of the court is subject to criticism, and conflicts with Buckner *v.* Mear, 26 O. S. 514.

Alsdorf *v.* Reed, 45 O. S. 653 (was a suit upon a note and for foreclosure, in which personal judgment was not asked).

nature can be compared to foreclosure of liens—mortgage—mechanics and vendors. When no personal judgment is asked, the only object of the case is the enforcement of the lien, and the legal cause of action is truly then only incidental to the equitable one, and the cause should be tried to the court. When personal judgment is asked in foreclosure, by virtue of the statute, it must be treated as an action for money only,[1] in which the parties are entitled to trial by jury upon the issues of fact arising therein.[2] It matters not what defense may be made in cases where personal judgment is not asked; whether the defense goes to the legal cause of action or not, it has no effect upon the method of trial. The decisions in Ohio are all to the effect that, where no personal judgment is asked in foreclosure, there is no right of trial by jury, even though issues be raised by a defense touching the legal cause of action.[3] This does not violate any constitutional right of trial by jury. While a legal cause of action is set forth, as to which issues of fact are raised by a defense, the only relief asked is the enforcement of an equitable lien. It is not in fact an action for the recovery of money.

Sec. 252. Trial where it is difficult to determine whether or not the cause of action is legal or equitable.—There is a class of cases where the facts constituting a cause of action are of such a nature that it is difficult to determine whether they call for legal or equitable relief. These cases lie "near the vague and indefinite boundary line between the jurisdiction of courts of law and equity. The books abound in cases lying near this line on either side, where unsuccessful attempts have been made to define, with some degree of precision, the limits of equity jurisdiction."[4] Under our system of pleadings it is required that plaintiff shall allege the *facts* relied upon to sustain the cause of action sought to be enforced, with a demand for the judgment to which the plaintiff was entitled, and it is sometimes difficult to determine whether or not the cause of action alleged is one purely equitable or purely of a legal character.

At common law the form of the action always determined its character; under the code the character of an action, that is, whether it is a legal or equitable action, is determined solely by whether or not the facts entitle plaintiff to legal or equitable relief; and the court will determine this matter entirely from the facts alleged without regard to the demand for relief, provided the facts are clear and unambiguous. The general rule,

[1] R. S., sec. 5021.

[2] Ladd *v.* James, 10 O. S. 438.

[3] Ladd *v.* James, 10 O. S. 438; Grapes *v.* Barbour, 58 O. S. 669; Alsdorf *v.* Reed, 45 O. S. 653; Scott *v.* Hewett, 7 O. C. C. 5; S. C. 3 C. D. 635.

[4] Culver *v.* Rodgers, 33 O. S. 541.

therefore, for the determination of the nature of an action and how it shall be tried, is by the nature or character of relief sought, or to which plaintiff is entitled.[1] This rule will govern causes where there is only one cause of action involved which calls for only one kind of relief. But when the facts constituting a single cause of action entitle the party to both legal and equitable relief, then the rule that the nature of the action is governed by the paramount relief which is demanded, or to which plaintiff is entitled, applies.

It is a general rule that the prayer of the petition is not looked to in determining the character of the action.[2] The prayer, while no part of the cause of action, is nevertheless part of the petition, and may frequently be resorted to in order to determine the character of the action.[3] Where the facts stated entitle plaintiff to either of two remedies, he may elect the one or the other by his prayer for relief and thereby determine the character of the action.[4] So where the facts would entitle the party to either legal or equitable relief, or where the facts alleged render the character of the action ambiguous and doubtful, the prayer will solve the doubt and determine the character of the action.[5]

Sec. 253. What effect does the defense have upon the method of trial?—Where the defendant sets forth new matter constituting merely a defense to the plaintiff's cause of action it has no effect whatever upon the mode of trial, as that is determined solely by the nature of the cause of action pleaded by the plaintiff. The cause of action may be legal, and the defense thereto may be equitable, and the latter may even defeat the former, but it does not change the mode of trial. It remains a legal cause of action which must be tried to the jury. It was with considerable difficulty that the courts, after the adoption of the code, even permitted an equitable defense to be made unless the defendant asked affirmative relief, but it is now the settled

[1] Gunsaullus *v.* Petit, 46 O. S. 27. ("The right to trial by jury does not depend upon the principles upon which relief is asked, but upon the nature and character of the relief sought. If the relief sought is a judgment for money only, the fact that before the adoption of our reformed system of procedure the proper remedy would have been by a suit in equity, does not effect the right of either party to a trial by jury upon any issue of fact made by the pleadings.") See Huber *v.* Huber, 10 O. 371; Alsdorf *v.* Reed, 45 O. S. 653; Black *v.* Boyd, 50 O. S. 46; Chapman *v.* Lee, 45 O. S. 356; Bricker *v.* Elliott, 55 O. S. 577; Avery *v.* Vansickle, 35 O. S. 273, 274; Corry *v.* Gaynor, 21 O. S. 277; Jenks *v.* Langdon, 21 O. S. 362.

[2] Miesse *v.* Loren, 5 O. N. P. 307; O'Brien *v.* Fitzgerald, 143 N. Y. 381; 1 Encyc. Pl. and Pr. 146; Corry *v.* Gaynor, 21 O. S. 277; Jenks *v.* Langdon, 21 O. S. 362; Avery *v.* Vansickle, 35 O. S. 274.

[3] Reed *v.* Reed, 25 O. S. 422.

[4] O'Brien *v.* Fitzpatrick, 143 N. Y. 377, 382; Hun *v.* Cary, 82 N. Y. 66; Miesse *v.* Loren, 5 O. N. P. 307; 1 Encyc. Pl. and Pr. 147.

[5] O'Brien *v.* Fitzgerald, 143 N. Y. 377; Yager *v.* Bank, 72 N. W. 211 (Neb. 1897).

rule that it may be done. The defendant in such case has not set up anything which partakes of the character of a cause of action, entitling it to any special or independent consideration as to the mode of trial. He merely answers the plaintiff, and states facts which show reasons why recovery should not be had.

On the other hand, a *legal defense* may be made to an equitable cause of action, but the mode of trial is still governed by the nature of plaintiff's cause of action.[1] A defense cannot draw to itself a mode of trial different from that prescribed for the cause of action to which it relates. If it merely sets forth some legal or equitable considerations for the purpose of resisting the plaintiff's demands without asking any affirmative relief whatever, and will not affect the mode of trial.[2]

Sec. 254. Trial where a defendant sets up a counter-claim or set-off.—It should be remembered, in the consideration of the subject of this section, that when a defendant pleads a counter claim or set-off, his plea should, as at common law, give color. He tacitly admits that, but for his counter-claim or set-off, the plaintiff is entitled to maintain his cause of action. The cause of action of plaintiff being admitted, there is then no issue raised as respects the case made by the plaintiff. It is difficult to imagine how a defendant may controvert the plaintiff's case when he sets up a counter-claim or set-off. As already stated, at common-law, a plea of confession and avoidance admits and avoids, and it would seem that an answer under the code setting up a counter-claim or set-off must admit and avoid. But White, J., in Buckner *v.* Mear,[3] speaks as though issue might in such cases be taken with plaintiff's case. He says that even though issue be taken on the averments of the petition, the materiality of such issue will depend upon the result of the trial of the counter-claim or set-off. This is believed to be inaccurate. While the code ignores the technical or artificial giving of color, yet in pleading new matter defendant expressly or by implication admits plaintiff's allegations.[4]

The mode of trial where defendant sets up a counter-claim or set-off is governed by the same provision of the code relating to trials. "Issues of fact arising in actions for the recovery of money only, or specific real or personal property shall be tried by a jury."[5] And all other issues of fact are tried to the court.[6] In an *action* for the recovery of money where the defendant interposes a *defense merely, which is only a defense*—whether legal or equitable—*and is not the subject of an independent cause*

[1] Smith *v.* Anderson, 20 O. S. 76; Alsdorf *v.* Reed, 45 O. S. 683.

[2] Gill *v.* Pelkey, 54 O. S. 348, 360.

[3] 26 O. S. 517.

[4] Morgan *v.* Hawkeye Ins. Co., 37 Ia. 359; Bryant's Pl., p. 237; Bliss Pl., sec. 340; Pomeroy's Code Rem., sec 678.

[5] Sec. 5130.

[6] Sec. 5131.

of action by defendant against the plaintiff, the *action* by plaintiff will still remain one for the recovery of money only, and the issues of fact arising therein must be tried by the jury, notwithstanding the fact that the defense of defendant calls for equitable relief, and if substantiated will extinguish plaintiff's claim. Advantage can be taken of the statute authorizing trial by jury, either by plaintiff or defendant, only when either is prosecuting an action or something which is the subject of an action; that is, when the defendant is asking for affirmative relief upon a cause of action against plaintiff.

"For some purposes a counter-claim, whether consisting of a legal or equitable cause of action, may be regarded as an action of itself. It is not simply new matter, operative only by way of defense. It must contain facts recognized by courts of law or equity as constituting an existing cause of action, which would have entitled the defendant to a judgment or decree in a separate action."[1]

A counter-claim or set-off draws unto itself a definite mode of trial according to its nature, and, although the plaintiff dismiss his action, the defendant may proceed to try his counter-claim or set-off.[2] Such matter falls within the provisions of the code above cited, and issues with respect thereto are tried according to the nature of the counter-claim or set-off. It may be legal or equitable; it is in fact a cause of action which the defendant has against the plaintiff, and is of equal dignity with the one set up in the petition, and may be tried independently of plaintiff's cause of action as of right.[3]

This is therefore clearly distinguishable from new matter which constitutes only a defense, and which does directly controvert the plaintiff's case.

The rule is announced in various cases that where the matter set up by the defendant is such that, if established, will extinguish or supersede the case made by the petition, the issues are tried to the court or jury according to the nature of such matter, whether legal or equitable.[4] And it has been held that matter set up in a cross-petition, as equitable cross-actions to a legal cause of action by the plaintiff, does not destroy the right of the plaintiff to have a jury trial upon his cause of action, unless such matter extinguishes or supersedes the case stated in the petition.[5] This can hardly be sound, as it would seem that a defendant has the right to have the issue raised as to his legal counter-claim or set-off, tried to a jury, whether it extinguishes plaintiff's claim or not.

[1] Buckner *v.* Mear, 26 O. S. 514, 518; Hill *v.* Butler, 6 O. S. 207.

[2] Sec. 5315.

[3] Gill *v.* Pelkey, 54 O. S. 348, 360, 361.

[4] Buckner *v.* Mear, 26 O. S. 514.

[5] Railroad Co. *v.* Morris, 10 O. C C. 502; s. c. 6 C. D. 640.

CHAPTER XI.

PREPARATION FOR TRIAL.

SEC.
255. Hints to beginners.
256. The pleadings.
257. How a lawyer should look at a case presented by a client.

SEC. 255. Hints to beginners.—The school of experience may be a good place to learn how to prepare for trial. The beginner will find it of great value to be associated with experienced counsel in preparing and conducting a case in which he is personally interested, by merely looking on, and doing what older counsel directs him to do. The first case which the beginner undertakes, it would be well for him to call some older counsel in to try it, and he look on. He has an interest in the case because it is his, and one looks at his own case much differently than some other person's case.

Much might be written on the preparation for trial, though it will not be of so much value as the actual experience in the work.

It has been in times past a lamentable fact that too little attention has been paid to the practical operation of the law by the law student. The student who secures his education by his own efforts in a law office possibly observes some points of practice, but experience demonstrates that he misses much. Until more recent years the subjects of both pleading and practice have not received that attention in law schools which they have deserved. But to the credit of the schools the subjects now occupy a prominent place in the curriculum. When the student reaches these studies in his course, he is able to see whether or not he has made proper progress. And the lawyer who becomes especially proficient in pleading and practice assumes and commands a responsible position at the bar. Not that the two branches are of so much greater importance than some others, for a lawyer cannot be skillful in pleading and practice unless he is well grounded in the fundamental principles of law in general. One who does not readily acquire the art of putting into practical operation, the knowledge which he has acquired, will make but little progress.

One author, speaking upon this subject, says: "If he is not the master of the art of getting up and trying his case, any success that he may have will only be accidental, and he must soon

give way in the arena of practice to his more practical brethren."[1] It frequently happens that the able judge, the profound and learned lawyer, is not always the most successful practitioner; the profound and learned lawyer may be outwitted by the skillful practitioner.

There is at almost every bar skillful practitioners whose chief characteristics are their success merely in the actual combat in the trial, something like the natural born orator; he does not pay much attention to the fundamental principles of the law. In the mind of this person books are of little value—and especially a book on practice or pleading. You have no doubt heard this expert practitioner say that he does not use a book on pleading, and that he never uses forms. He knows all the law, and carries it in his head; when he acquires a knowledge of the facts of his case he goes ahead, probably not looking at a book from beginning to end, depending in the heat of battle upon his natural ability. This sort of a practitioner may meet with success for a time, and may gain verdicts from juries, but when he goes before judges and the higher courts, his weakness appears, and he then acquires a different reputation.

An ideal may be pictured somewhat as follows:

He is not necessarily naturally brilliant, but is a diligent, painstaking, never-ceasing worker; always in search of knowledge; after he has acquired and thoroughly digested the facts in a cause, he forms his own opinion as to what the rights of his client are by his own sense of natural justice; then the books are consulted, a definite theory or line of action is mapped out which he feels sure can be maintained by law. He then satisfies himself that his client can substantiate and prove his claim, either by an actual interview with the witnesses or in some other satisfactory manner. Reliance cannot always be placed upon the client's statement as to what the witnesses will testify to; the client is not versed in the law and not capable of getting the desired information. In some instances, it is absolutely essential that the witnesses be personally interviewed before it can be determined whether the client has a cause of action. Facts once thoroughly in hand, and the rights of client growing out of such facts carefully determined in the light of the law, the drawing of the pleadings commences. The case may be of such nature that it will be unnecessary to examine forms and rules of pleading. But if counsel is not certain he will consult the books. The pleadings having been drawn and re-examined in the light of the proof, the case is launched.

Then real preparation for trial begins. Witnesses are inter-

[1] Reed's Practical Suggestions, preface.

viewed, their statements taken, and a brief upon the law and the evidence prepared.

The school of experience is not the only means of acquiring the art of preparing and conducting a cause. He must have some direction in connection with his experience. He must be guided either by an experienced practitioner, or by a volume touching upon such matters as will be useful towards the end in view.

This book is prepared with the hope that the rules of practice, both practical and theoretical, may be so conveniently arranged as to guide the lawyer to the successful management of litigation. We begin with the formation of the issues by the pleadings, going over such features in the preparation of the cause for trial as may be pertinently suggested to one seeking such information, then treating such matters as are involved in the conduct of the trial.

If one expects to become an adept in practice, he must be prepared for every emergency that is likely to arise in a case; it is possible to foresee almost every contingency that may arise, and he should be prepared to adapt himself thereto.

Sec. 256. The pleadings.—During the progress of the preparation of a cause there are apt to be new things develop. It is supposed that the facts have been fully and completely amassed before the pleadings are drafted, and that they are drawn so as to completely cover the evidence as it will be adduced. But this may not always be so. It is not always practicable to interview the witnesses before the pleadings are drawn; that most frequently is done after the case is filed. The pleadings must be familiar and always kept in mind when preparing and ascertaining the evidence, so that there may not be any mistake made as to the right to have the testimony admitted. There should be no risk taken in this matter. If there is any danger that the issues are not broad enough to admit the testimony, delay and amendment is preferable.

Some practical suggestions as to the manner of drafting pleadings, not found in books on the subject, may be offered. Logic, so necessary in pleading, was not swept away with the technicalities of the common law. Setting forth the facts as they actually occurred, in ordinary and concise language, necessarily implies logical statement. Stating the facts as they occur, means alleging them in their chronological order. It will be so much easier to state the case so as to bring the facts within the rules of law after counsel has examined and digested the law. The pleadings must proceed upon a definite theory, and everything throughout the case must bend to that theory.

Sec. 257. How a lawyer should look at a case presented by a client.—Too much stress cannot be laid upon how the lawyer should look at and consider a proposed case presented by a client. It is perhaps true that the lawyer becomes a partisan of the client, but he must view the case when presented to him from an impartial standpoint.

Mr. Bishop has well said that: "When one is approached by a client asking for advice, he should be able to cast aside all private interest, both his own and those of his client, and sit upon the question as would an impartial judge. But, when this work is accomplished, and the case is made up for trial, then the true lawyer ceases to be impartial; he feels, he acts, he does everything in the place of his client, whose cause is his cause, and whose interests are his interests. Not, indeed, does he do what is dishonest or dishonorable, for such a thing the client ought not himself to do. But, beyond this, and within the proper and recognized limits, his interests and his client's being merged, he, like the client, ceases to be impartial."[1]

It is oftentimes a difficult and delicate task for a lawyer to decide whether his client has presented a case which ought to be instituted. It is of course impossible to decide absolutely and positively that the client's cause can be successfully maintained; but it is the duty of the lawyer to carefully examine the law, and weigh the facts, and give the client a careful, honest opinion as to whether the case can probably be made. Both sides of the law must be examined, and all obstacles must be considered, and the client fully advised as to them, so that if there are any doubts and misgivings, the client may assume the responsibility.

The lawyer's reputation depends very largely upon his frankness and honesty in fully advising the client of the probabilities and possibilities of a cause, and then when the client has been so fully informed, he cannot complain if something occurs during the course of the trial which endangers his interests.

One characteristic or trait which is often found in the younger practitioner needs watching and training. It is "over-zealousness" in the client's contention. If he is over-zealous at the beginning, he then becomes partisan, which he should not be. A client is sometimes encouraged by the over-anxiety or zealousness of the counsellor, and colors the facts and claims.

[1] Bishop, 1st Book, sec. 476.

CHAPTER XII.

DECORUM OF THE LAWYER IN THE CONDUCT OF THE TRIAL.

SEC.
258. Decorum in the conduct of the trial.
SEC.
259. Quibbling over petty matters.

Sec. 258. Decorum in the conduct of the trial.—In discussing the subject of "The Decorum of the Lawyer in the Conduct of the Trial," it might be fully covered by one sentence. He must be a gentleman from the opening to the closing of the case. That implies a great deal. In the first place, he must be dignified; that does not mean that he must put on, or that he should assume, an unnatural attitude. One who is natural, earnest and honest, is dignified. In his conduct toward the court, jury, witnesses and opposite counsel, he must be uniformly courteous. The varied phases of his conduct during the course of a trial must depend upon the circumstances, as it cannot always be the same.

If counsel on both sides are about equally matched as to calibre and temperament, and are gentlemanly, the trial will be conducted properly.

If one is a dignified, cool, courteous gentleman, and the other a nervous, excitable person, the contest will be interesting. The nervous person will need considerable watching and curbing, and this has to be done by opposite counsel, and should be done in a kind, courteous, determined manner.

If one counsel should lose his temper that is no reason why the other should lose his.

In the examination of witnesses the manner depends considerably upon the temperament of the witness.

Opposite counsel, witnesses, and even the court may become irritable, and some unkind expression may be made, but this should never disturb the evenly balanced lawyer.

"A good temper is an inestimable advantage to a lawyer, old and young; and whatever his position it will carry him, as it were, with railroad ease, comfort and rapidity, over all obstructions, to the end of his journey; it will lengthen his life, as well as make it happy. A *bad* one will strew his way throughout with thorns, will convert every one with whom he has to deal into an enemy, and himself, in short, into his greatest."

Mr. Warren (Law Studies) tells of an instance where he

heard a judge in open court utter a severe and petulant sarcasm against a popular counsel. The latter, however, ready as he was, uttered not a word in reply, but fixed upon the judge, for a moment, a steadfast, unwavering look,

"A cold, rebukeful eye,"

and then calmly proceeded with his argument, as if he had not been interrupted. He,—the judge,—the whole court, felt where the triumph was.

Always be cool and self-possessed. Excitement, nervousness, over-zealousness, may lose the case. Avoid showing surprise at a sudden or unexpected turn of a case. Of a famous jury lawyer it has been said: "In the trial of a lawsuit he was like an opossum slung through a tree; if he lost his hold in one foot, he caught on by the other, and if he was forced off all his feet, he swung by his tail."

Mr. Munson, on El. Pr., sec. 83, says on this subject: "The lawyer should never forget that he is bound to sustain the character of a gentleman, and that any exhibition of coarseness, vulgarity, undue forwardness, or lack of dignity, is sure to injure his professional reputation. A considerate respectfulness of demeanor, far removed from anything like pertness, bantering, jocular familiarities, and attempts to be sharp and smart, characterize the successful lawyer."

Sec. 259. Quibbling over petty matters.—An able judge once gave the following most excellent advice, which it would be well to follow: "In the trial, do not quibble or spend time on petty matters or questions. It marks the petty lawyer as well as a little case, and the court and jury will inevitably be prejudiced against you for quarreling and wasting time about little things. In every case there are some prominent facts which determine the rights of the parties, and you should bend your energies to to them."

CHAPTER XIII.

TIME OF TRIAL—AND CONTINUANCES.

SEC.
260. What term actions triable.
261. Causes triable in their order upon docket.
262. Out of order cases.
263. Hearing of motions and demurrers.
264. Right to continuance.
265. Grounds for continuance.
266. Absence of witness.
267. Surprise.
268. To secure deposition.
269. Absence of counsel.
270. Continuance because of amendment.
271. Continuance of criminal cases.
272. Application made by motion and affidavit.
273. Refusal to grant continuance—How taken advantage of.
274. Temporary suspension of trial.

SEC. 260. What term actions triable.—Necessarily a cause of action cannot be tried until there is an issue formed by the pleadings, and when the issue has been formed, it is triable at the first term of court thereafter. If the issues are made up during a term of court, and the cause is reached, it may be tried at such term, and where the issues are, or should have been made up either before or during a term of court, but after the period for the preparation of the trial docket of the term, the clerk, if required by the court, shall place such actions on the trial docket of that term.[1] Where there has been default on either side, or where there is any issue not met by the pleading of the adversary and there is an account to be taken, or damages to be assessed, the court may either take the account and assess the damages, or it may refer the matter to a referee, master or jury, and the cause will then be tried in the absence of an issue.[2] The matter of setting a case for trial is very largely governed by rules of court which are not by any means uniform. A very excellent method is followed in which it is required that counsel shall, a certain number of days before the commencement of a term of court, file a notice of trial in all cases in which the issue is made up and consequently ready for trial, and from such notices the clerk makes up the trial docket, only such cases as have been noted for trial being placed upon the docket, and if the issues have been made up during a term, they may, in the same manner by the filing of a notice for trial, be entered upon the docket. The time when issues must be formed is regulated by

[1] R.S., sec. 5135. See also R. S., sec. 5573. [2] R. S., sec. 5320.

statute in almost every case, with possibly not more than one exception. Should the court, by oversight, fail to fix a time within which an amended petition should be filed, the setting of such case for trial on a specific day would be in effect an order that the issue be made up by that day.[1]

As a matter of course, when a case is set for trial on a special day, it should not be called for trial on any other day, unless done so by agreement of parties, as the calling of a case for trial before the day set for hearing, and compelling the parties to go into trial, is error.

Sec. 261. Causes triable in their order upon docket.—All cases involving issues of fact or in which damages are to be assessed other than actions for wages, must be tried in the order in which they stand upon the trial docket, unless by consent of parties, or by order of court they are continued or placed at the heel of the docket, or for good cause shown are especially assigned for trial or hearing out of their regular order. The court may, however, assign for trial causes triable to a jury, in a series in the order in which they stand on the docket, and causes not triable to a jury in a like manner.[2] The courts in some localities adopt rules regulating the assignment of causes for trial, but it has been held that where a different rule has been adopted the setting of cases is governed by the rule and not by the statute.[3] The court is, however, given some discretion in the matter, and may direct cases to be tried in a different manner.[4]

Sec. 262. Out of order cases.—For good cause shown, the court is empowered especially to assign causes for trial out of their regular order, actions for wages always being entitled to first preference.[5] Before an amendment of the statute it was held that cases on demurrer might be heard out of the order in which they stood on the trial docket.[6]

Sec. 263. Hearing of motions and demurrers.—The court may at any time hear a motion or demurrer, and may by rule prescribe a special and regular time for the hearing of motions and demurrers.[7] Every locality prescribes its own rules in this matter, selecting a certain date or time for the hearing of such matters.

[1] Neininger *v.* State, 50 O. S. 394, 404.
[2] Sec. 5134.
[3] Karle *v.* Beckman, 11 W. L. B. 155.
[4] *Id.*
[5] R. S., sec. 5134.
[6] Smith *v.* Bank, 26 O. S. 141.
[7] R. S , sec. 5134.

Sec. 264. Right to continuance.—There might be considerable said upon the subject of continuances, but that is beyond the scope or design of this work. The most successful practitioner will avoid delays, as they are detrimental both to client and attorney. There are a certain class of cases which suffer by delay, while another will be benefitted thereby.

The whole matter of continuance, as to when it will or will not be granted, whether in criminal or civil cases,[1] rests solely within the sound discretion of the court, and there cannot be any complaint respecting the action of the court, unless it clearly appears from all the facts and circumstances that there has been an abuse of discretion operating to the prejudice of the party in the final determination of the case.[2]

The action of the trial court overruling a motion for a new trial on this ground cannot be reviewed.[3]

But, as we are well aware, whenever a matter is made discretionary, it must not be abused or exercised in an arbitrary manner; and whenever this is so there can be a reviewal of the action of the court.[4] But the reviewing court cannot examine into the question unless the evidence is set out so as to enable the court to say that there has been an abuse of discretion.[5] The discretionary power to set aside a sale and confirmation is not lost by the continuance of a motion for that purpose to another term.[6]

Sec. 265. Grounds for continuance.—There is no special statute in Ohio regulating the matter of continuance, prescribing special grounds therefor. This is so because the matter is confided entirely to the discretion of the court, and it would not be discretionary if there were prescribed reasons for granting a continuance. This being so, it would seem that the court could not be aided by precedent. But as the discretion must not be arbitrarily exercised, precedent may appropriately be summoned to the aid of the court.

Sec. 266. Absence of witness.—Another ground for the continuance of a case is the absence of a witness. A continuance on account of the absence of a material witness may be granted when all of the proper conditions are present. The rules adopted by the courts regulating this matter are, however, rather strin-

[1] Comerford *v.* State, 23 O. S. 599.

[2] Holt *v.* State, 11 O. S. 691; Griffin *v.* State, 18 O. S. 438, 446; Loeffner *v.* State, 10 O. S. 598. See Elliot's Gen. Pr., sec. 481.

[3] Loeffner *v.* State, 10 O. S. 599; Huff *v.* Fisher, 26 O. S. 7.

[4] Diebold *v.* Power, 32 O. S. 173; Davis *v.* Riverside, &c., 84 Wis. 262; McDonald *v.* McAllister, 49 N. W. 377 (Neb.)

[5] Holt *v.* State, 11 O. S. 691.

[6] Niles *v.* Parks, 49 O. S. 370.

gent. In the first place, it must be clear that the testimony will be material.[1] And if so, continuance should be granted,[2] but not if merely cumulative.[3]

A continuance on this ground may be had in either criminal or civil cases upon request or motion of either side, although there is a limitation placed upon the right of the State to ask for continuances.

Very considerable care should be observed in the preparation of the application for continuance upon this ground. Ordinarily the application or motion is made orally to the court, but is accompanied by an affidavit setting forth the grounds therefor. These should be very explicitly set forth. It should be shown what it is expected that the witness will testify to, so as to enable the court to determine the materiality of his evidence; the cause of the absence of the witness;[4] that it is unavoidable;[5] and that due diligence has been exercised to obtain the evidence. Some courts may be satisfied with a general allegation in the affidavit that diligence has been exercised, while others may hold that specific acts disclosing due diligence may be set forth.[6]

A general allegation of diligence ought to be ordinarily sufficient unless the court has very grave doubts that the motion is not made in entire good faith. In most cases, however, the circumstances appearing from the face of the affidavit will show or disclose the diligence exercised and thereby render unnecessary the allegation of specific facts. It should also appear from the affidavit that there is a reasonable opportunity of procuring the testimony of the witness within the time asked for.[7] Unless it incidentally appears from the affidavit that the deposition of a witness could not have been procured, it should be stated or alleged that the same could not have been done in time for the trial, or that an attempt had been made to procure it.[8] Where the adversary will admit that the absent witness will give the testimony that it is claimed in the application for continuance that he will give, that ends the continuance upon that ground.[9] The credulity of a statement made in the affidavit may be attacked in the same manner as that of a deposition, by impeaching the veracity of a witness,[10] as under the statute

[1] Pacific Ex. Co. *v.* Real Estate Association, 16 S. W. 792 (Tex.).

[2] Stone *v.* Ry. Co., 53 N. W. 189 (S. D.)

[3] Dillingham *v.* Ellis, 86 Tex. 447.

[4] Davis *v.* Foreman, 20 S. W. 52.

[5] Home Fire Ins. Co. *v.* Galley, 43 Neb. 71.

[6] Struthers *v.* Fuller, 26 Pacific, 471. See R. R. Co. *v.* Olive, 40 Ill. App. 82.

[7] Hyde *v.* State, 16 Tex. 445; Ohio & Miss. R. W. Co. *v.* Dickerson, 59 Ind. 317.

[8] McKay *v.* Ins. Co., 2 Caines, 384.

[9] Stevenson *v.* Sherwood, 74 Am. Dec. 148; State *v.* Gibbs, 10 L. R. A. 749; Whitehall *v.* Lane, 61 Ind. 93, 95; State *v.* Bartley, 48 Kan. 421. This is so also in criminal cases. Comerford *v.* State, 23 O. S. 599.

[10] U. S. Life Ins. Co. *v.* Wright, 33 O. S. 533.

the affidavit, when read in evidence, is to be treated as the evidence of an absent witness.[1] Ordinarily where a party relies upon a mere promise of a witness to be present, he is not entitled to a continuance if he fails to keep the promise.[2] A subpœna should be served upon the witness, or an attempt made in that direction, that is the issuance of a subpœna.

Sec. 267. Surprise.—Surprise by reason of unexpected testimony developed during the trial has been held to be good cause for continuance.[3]

Sec. 268. To secure deposition.—A party who has taken depositions which have not arrived in time for trial, may, where due diligence has been exercised, have the cause continued for that reason.[4] It must of necessity appear that the testimony so taken is material;[5] and he may be required to set forth in his affidavit what he expects the witness whose deposition has been taken or is to be taken, will testify to.[6]

Sec. 269. Absence of counsel.—The inability of counsel to be present at the trial of the cause is generally considered good ground for a continuance, though not under any and all circumstances. The absence of counsel must be with sufficient excuse, such as sickness of himself or of some member of his family,[7] or by being a member of the General Assembly in attendance upon his legislative duties.[8] A continuance on the ground of the absence of counsel cannot be granted as a matter of right,[9] and even where sickness does not prejudice the rights of the party it may not be sufficient ground for a continuance,[10] and especially where the certificate as to sickness is of a vague and unsatisfactory character.[11] An application for a continuance cannot very well be entertained on the ground of absence of an attorney where he has an associate present when the cause is set for trial,[12] nor is the court obliged to grant a continuance where counsel are absent on other business,[13] although it would seem that it ought to be granted. When counsel are engaged in the trial of other cases at the time, the court may very appropri-

[1] U. S. Life Ins. Co. *v.* Wright, 33 O. S. 533.

[2] Campbell *v.* Blanke, 13 Kan. 62; State *v.* Cross, 12 Ia. 66; Day *v.* Gelston, 22 Ill. 102.

[3] Childs *v.* State, 10 Tex. App. 183.

[4] Marsh *v.* Hulbert, 4 McLean, 364.

[5] Morgan *v.* Voss, 1 Cranch, 134.

[6] Comerford *v.* State, 23 O. S. 599.

[7] Eslinger *v.* East, 100 Ind. 434; Thompson *v.* Thornton, 41 Cal. 626; Vicksburg, &c., Ry. Co. *v.* Scott, 47 La. Ann. 706.

[8] Harrigan *v.* Turner, 53 Ill. App. 292; *cf.* Sharman *v.* Morton, 31 Ga. 34; Stockley *v.* Goodwin, 78 Ill. 127.

[9] Gould *v.* Banking Co., 36 Ill. App. 390; Baumberger *v.* Arff, 96 Cal. 261.

[10] Ford, &c. *v.* Brown, 30 N. E. 925 (Ind. App.).

[11] Randall *v.* Ins. Co., 14 N. Y. 631.

[12] Zelinsky *v.* Price, 8 Wash. 256.

[13] Sharman *v.* Morton, 31 Ga. 34; Burchard *v.* Boyce, 21 Ga. 6.

ately allow a continuance,[1] although where there is co-counsel in the case the court may, under certain circumstances, refuse it.[2] But if counsel who has taken sick is the leading counsel, and his co-counsel in the limited time cannot do justice to the client's cause, there ought to be a continuance.[3]

Sec. 270. Continuance because of amendment.—When the pleadings have been amended by either party, and the court is satisfied by affidavit or otherwise, that the adverse party could not be ready for trial in consequence of the amendment, the continuance may be granted to some time in the term or to another term of court.[4]

It is only where the amendment will seriously prejudice, or cause surprise to the opposite party, that the court is justified in granting a continuance on this ground ;[5] and this, as a matter of course, rests with the court to be decided in each case upon its own peculiar circumstances, unaided much by precedent. Allowing an amendment at bar in an action for negligence by inserting an allegation that the defendant had notice of certain defects, has been held not ground for continuance ;[6] and so with an amendment correcting the name where service is acknowledged.[7]

Sec. 271. Continuance of criminal cases.—There is a statute which provides that no person shall be detained in jail without trial, on an indictment for a continuous period embracing more than two terms after his arrest and commitment thereon, or, if he was in jail at the time the indictment was found, more than two terms after the term at which the indictment was presented; he shall be discharged unless a continuance be had on his motion, or the delay be caused by his act.[8] Another statute provides that no person shall be held to answer an indictment without trial for a period embracing more than three terms, not including the term at which a recognizance was first taken thereon, if taken in term time ; but he shall be discharged unless a continuance be had upon his motion or the delay be caused by his act, or there be not time to try him at such term, and in the latter case, if he be not brought to trial at the next term, he shall be discharged.[9] Applications for continuance in criminal and civil

[1] Hill *v.* Clark, 51 Ga. 122.

[2] Smith *v.* State, 132 Ind. 145. See Walker *v.* State, 13 Tex. App. 619; Summerlin *v.* Dent, 36 Ga. 54; Sager *v.* O'Connel, 7 La. Ann. 453.

[3] Sheltz *v.* Moore, 1 McLean, 334.

[4] R. S., sec. 5117; Mather *v.* Furnace Co., 1 W. L. M. 351.

[5] Chicago, &c., Ry. Co. *v.* Goyette, 32 Ill. App. 574; 24 N. E. 549; Gillett *v.* Robbins, 12 Wis. 319 (surprise). It must be material, Russell *v.* Martin, 3 Ill. 492, not of form, Chambers *v.* Lane, 5 Mo. 289.

[6] Danville & W. R. R Co. *v.* Brown, 18 S. E. 278.

[7] Chattanooga, &c., R. R. Co. *v.* Jackson, 86 Ga. 676.

[8] R. S., sec. 7309.

[9] R. S., sec. 7310.

cases stand very much upon the same footing so far as the grounds upon which they may be granted; but there is a distinction in that in criminal cases there is a limit to the time within which such applications may be made, as shown by the sections of the criminal code just quoted. And where a criminal cause is continued without disclosing the ground, it will be presumed that a continuance was granted upon sufficient ground in the absence of anything in the record to the contrary.[1]

Even where the application is made for the discharge of a defendant under and by virtue of the statute above mentioned, the court is satisfied that there is material evidence for the State which cannot then be had, that reasonable exertion has been made to procure the same, and that there is just ground to believe that such evidence can be had at the next term, the cause may be continued, and the prisoner remanded, or admitted to bail; and if he be not brought to trial after the next term, he may then be discharged.[2] And it has been held that under this provision when an application is made for continuance, whether during the time limited, or at the subseqent term of court, if the State is ready to proceed with the trial, or makes a showing required for a continuance, the accused will not be entitled to be discharged.[3]

Sec. 272. Application made by motion and affidavit.—An application for a continuance may be made by motion, either orally or written, accompanied by one or more affidavits. It should usually be made in advance of setting the cause for trial, although it may be urged at that time or even as late as the day actually set for the trial. The affidavit, it is said, may be made in the absence of any statutory requirement, by the party, an agent, his attorney, or by any one in his behalf.[4]

The affidavit should set forth clearly the grounds upon which the application is based, and must especially allege all the facts essential to the granting of the application. The question whether counter-affidavits may be admitted against the application seems to be controverted somewhat. Some very responsible authorities hold that it is not good practice to admit counter-affidavits refuting the grounds set forth in the application for continuance;[5] but this hardly seems consonant with the idea that granting a continuance is a discretionary matter, as

[1] Johnson *v.* State, 42 O. S. 207.

[2] R. S., sec. 7311.

[3] *Ex parte*, McGehan, 22 O. S. 442.

[4] Elliot's Gen. Pr., sec. 484; Abbott *v.* Zeigler, 9 Ind. 511; Espy *v.* Bank, 5 Ind. 274; Lockhart *v.* Wolfe, 82 Ill. 37.

[5] Williams *v.* State, 6 Neb. 334; Linvill *v.* Golding, 11 Ind. 374; Shattuck *v.* Myers, 13 Ind. 49; State *v.* Simion, 30 La. Ann. 206.

the court may certainly permit counter-affidavits to be fil and may undoubtedly receive further testimony.[1]

Affidavits used on a motion for continuance cannot be regarded as part of the record, although copied by the clerk into the record, unless they are made so by a bill of exceptions.[2]

Sec. 273. Refusal to grant continuance—How taken advantage of.—If it is desired to take advantage of the action of the trial court with reference to an application for continuance, the same method must be pursued as in all steps during the progress of the trial. That is, an exception must be taken and preserved together with all affidavits or other evidence which may have been introduced, in a bill of exceptions.

Sec. 274. Temporary suspension of trial.—Under special circumstances and for special reasons and urgent necessities, the progress of a trial may be temporarily suspended. The time proper to be allowed for that purpose must be determined by the sound discretion of the court, in view of all the circumstances of thecase. A suspension may be had for the purpose of securing the attendance of a witness under subpœna, who has departed without leave after the trial has been commenced, by attachment.[3]

[1] Consult Thompson *v.* Jamison, 1 Cranch, 285; Linvill *v.* Golding, 11 Ind. 374; Elliot's Gen. Pr., sec. 484.

[2] Schultz *v.* State, 32 O. S. 276.

[3] Griffin *v.* State, 18 O. S. 438.

CHAPTER XIV.

DISQUALIFICATIONS OF JUDGE.

SEC.
275. Judge must be wholly disinterested.
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SEC. 275. Judge must be wholly disinterested.—It has been the policy of the law, both common and American, that no case can be tried by a judge who is interested therein.[1] This matter is regulated by statute, as shown in the succeeding sections. The statute merely provides that interest, relation to, or bias or prejudice either for or against either party disqualifies. It remains to be determined by a construction placed upon facts what will come under the statute.

SEC. 276. What may be done when judge interested—The statute.—The statute provides that there may be a change of venue when a judge of a common pleas court is interested in any case, the matter pending in any court in the county or his district, or is related to, or has a bias or prejudice either for or against, either or any party to such cause, or is otherwise disqualified to sit in such cause or matter, and there is no other judge in the same subdivision who is disqualified.[2] If all the judges of the superior court of Cincinnati are interested in the event of any action pending before any of them, the same may be removed for trial into the court of common pleas of Hamilton county, under an order of the court.[3] And if the probate judge is

[1] Judge Elliot, in his General Practice, sec. 210, says: "The common law rule that no man shall be a judge in his own cause is an expression of the principle of natural justice, and was formally interwoven into the governmental system of our English ancestry, and it is regarded as a part of our organic law." Judge Cooley says: "A legislative act which should undertake to make a judge the arbiter in his own controversy would be void, because though in form a provision for the exercise of judicial power, in substance it would be the creation of an arbitrary and responsible authority, neither legislative, executive, nor judicial, and wholly unknown to constitutional government."

"The maxim that no man shall be a judge in his own case is one deeply rooted in the common law, and can never be overlooked anywhere where impartial justice is one of the objects of judicial administration." The Pen. Ry. Co. *v.* Howard, 20 Mich. 18.

[2] R. S., sec. 550.

[3] R. S., sec. 502.

interested, as heir, legatee, devisee, or in any other manner in any estate which would otherwise be settled in the probate court of the county where he resides, such estate may be settled by the court of common pleas ; and in all matters which the probate judge is interested in they may be taken to the court of common pleas to be disposed of there.[1] The steps to be taken in the court of common pleas where there is a judge interested in the cause is to file an affidavit setting forth the fact of the interest, bias, prejudice, or disqualifications of the judge. The clerk is thereupon required to enter the fact of the filing of the affidavit on the trial docket in such case, and to forthwith notify the supervising judge, or if he be disqualified, a judge of some other subdivision who is qualified.[2] The supervisory judge must then designate some other judge of the district who may not be for the time being engaged in holding a court, to discharge the duty of such judge who is disqualified and could not try such cause.[3] And it shall thereupon be the duty of the judge so assigned to proceed and try such case.[4] The affidavit need not set out facts upon which they base their claim.[5]

Sec. 277. Duties of clerk are ministerial.—When the affidavit mentioned in the preceding paragraph is filed with the clerk, he has no alternative but to forthwith notify the supervising judge. His duties in this behalf are purely ministerial in their character, and he can exercise no discretion whatever. If he refuses to act he may be compelled to do so by a writ of mandamus. He cannot justify his refusal upon the ground that the facts stated in the affidavit are not true.[6] This principle was, however, laid down when the statute requires the clerk to enter upon the docket an order directing the papers in the cause to be transmitted to the clerk of an adjoining county in the same subdivision. But it is clearly applicable to an act now required of the clerk under the procedure prescribed by the statute as amended, although there may not be so much occasion for its application.

Sec. 278. Interest of judge disqualifies—Its nature.—The statute provides when the judge is interested in any cause or matter pending, without more particularly determining what the nature of that interest must be. It is left for determination in each case. It is not difficult, however, to decide when a judge is disinterested in a matter. It is seldom now that it is necessary for parties to take the course designated in the statute, as a judge will himself refuse to go into the trial of a cause if

[1] R. S., sec. 535.
[2] R. S., sec. 550.
[3] R. S., sec. 469.
[4] R. S., sec. 550.
[5] State *v.* Wolfe, 11 O. C. C. 591; 2 O. D. 245.
[6] State *v.* Shaw, 43 O. S. 324, and cases cited.

he is in anywise interested. So will there be a strong presumption in favor of his acts if he proceeds with the trial of a cause, when it is thought that he is interested.[1] The principal question under the statute is as to the character of the interest, which will operate as a disqualification. It can hardly be true that the general interest which a judge has in a controversy as a tax-payer in common with other tax-payers, in a question in which all property owners as tax-payers are equally interested, does not disqualify a judge from sitting in judgment in cases against his county;[2] though this may not apply to cases where it will directly affect the judge's property.[3]

The interest which disqualifies a judge is an interest in the event of a cause or proceeding, that is, an interest in the issue, result or outcome of the trial, or adjudication. It must be an interest of a pecuniary character.[4] As illustrative of this pecuniary interest which will disqualify a judge, is where he is a

[1] "While it is essential that a judge before whom a cause is tried shall be wholly disinterested in the result in order that his decision may be entirely impartial, it must at the same time be considered that any person who holds the responsible position of a judge will always be sensitive to any suggestion of his interest in a matter before him, and quick to free himself from any opportunity of acting in a case in which he is disqualified. It must also be considered that the same desire to be faithful to his office which will cause him to decline to sit or act in such a case will be his reason for acting in any case in which he is not disqualified. *He has no more right* to refuse to act in a matter before him where he is not disqualified than he has to act in a cause in which he is disqualified, either from interest or from any other reason." Heinlon *v.* Heilbron, 97 Cal. 101, 106.

[2] Probasco *v.* Raine, 50 O. S. 378, 392; Commissioners *v.* Lytle, 3 O. 290.

[3] *In re* Guerero, 69 Cal. 88. Not so held in Texas. A judge who holds property subject to a city tax which is sought to be collected, is disqualified to render judgment enjoining the collection. Wetsel *v.* State, 5 Tex. Civ. App. 17. In Rawson *v.* Boughton, 5 O. 326, distinguished in State *v.* Winget, 37 O. S. 153, 155, one of the judges of the court of common pleas was interested in the subject-matter of the petitions; the president judge had been of counsel for one of the parties in the matter in litigation. These facts being shown to the judges of common pleas, they certified the cause to supreme court for decision.

The statute should receive a liberal construction. The prohibition does not extend to cases where the interest is simply in some question of law, or where it is indirect or remote. But in an action for injunction where the property of the judge was equally subject to inquiry by the acts sought to be enjoined and the injunction would equally protect his property, he is disqualified. North B. G. M. Co. *v.* Keyser, 58 Cal. 315. See City of Austin *v.* Nalle, 85 Tex. 520.

Judges of the common pleas are not disqualified by *interest* to try a cause, where the commissioners are a party, and money the subject in controversy. The only interest they have is that which they have in common with other citizens. The Commissioners *v.* Lytle, 3 Ohio, 290; 13 Mass. 324, 344.

If a trial justice is otherwise disqualified from receiving and hearing a complaint for an offense punishable by fine by the fact that it is committed in the town in which he is a resident and tax-payer, such disqualification is removed by the Pub. Sts. Commonwealth *v.* Fletcher, 157 Mass. 14.

Interest in a question to be determined does not disqualify a judge of a district court, but is made a disqualification of a judge of the court of appeals or of the supreme court. Grigsby *v* May, 84 Tex. 241.

[4] State *ex rel. v.* Winget, 37 O. S. 153; Northampton *v.* Smith, 11 Metc. 390, 395.

stockholder in a corporation which is a party to a suit,[1] but not where his interest had ceased before suit,[2] or where interested in the event of a proceeding to appropriate land,[3] or where a judge was a surety upon a bond in the case before going upon the bench,[4] or where the judge is in possession of the land involved in an action to try title.[5] But a judge is not disqualified merely because he has commenced an independent suit against the plaintiff upon an entirely different matter,[6] or when the judge was a member of the city council when that body considered the same matter.[7]

Sec. 279. Relation to party disqualifies.—The statute has changed the common law, making relationship a disqualification. The statute in Ohio does not prescribe the degree of relationship which disqualifies a judge.[8] It has been held that where the judge is related within the sixth degree he is disqualified,[9] and so when within the third degree.[10] Relation by affinity has been also considered a disqualification.[11]

Sec. 280. Bias or prejudice disqualifies.—The degree of bias or prejudice which will under the statute disqualify a judge from sitting, is not pointed out by the statute. In the language of a recent opinion, it is a sort of metaphysical question as to whether a judge is biased or not. If the ruling of the circuit court is right, it does not matter how much the judge is biased, or how or for what reasons he is biased. It is held that the fact of bias or prejudice is not issuable; that all that is necessary is for the party to file the affidavit asking for the designation of another judge to try the case on account of prejudice or bias, stating no other facts than the simple one that the judge is biased, without the facts and reasons upon which it is based, and that when this affidavit is filed the judge who is claimed to be biased or prejudiced has nothing further to do with the case.[12] Different parties cannot join in the proceeding to disqualify a judge in different actions in which they are not jointly liable or interested.[13]

[1] C. W. & Z. R. R. *v.* Gill, 10 W. L. J. 213; Ins. Co. *v.* Price, Hopk. Ch. 1; Matter of Reddish, 2 N. Y. Supp. 259. See Peninsular Ry. Co. *v.* Howard, 20 Mich. 18.

[2] B. F. Nicholson *v.* Showater, 83 Tex. 99; Palmer *v.* Lawrence, 5 N. Y. 389.

[3] Gregory *v.* R. R. Co., 4 O. S. 675.

[4] State *ex rel. v.* Castleberry, 23 Ala. 85, 91.

[5] Casey *v.* Kinsey, 5 Tex. Civ. App. 3.

[6] Southern Cal. Motor Rd. Co. *v.* Bank, 100 Cal. 316.

[7] Waters-Pierce Oil Co. *v.* Cook, 26 S. W. 96.

[8] R. S., sec. 550.

[9] People *v.* Connor, 142 N. Y. 130.

[10] Lewis *v.* H. Roller Mill Co., 23 S. W. 338 (Tex. 1895); Frieburg *v.* Isbell, 25 S. W. 988 (Tex.).

[11] Jordan *v.* Moore, 65 Tex. 363.

[12] State *ex rel. v.* Wolfe, 11 O. C. C. 591; s. c. 6 Cir. Dec. 118.

[13] *Id.*

Sec. 281. Other reasons for disqualification.—Otherwise disqualified is the third sweeping ground for disqualifying a judge from sitting in a cause. What comes under this head must depend upon the peculiar facts of each case. Usually the fact that the judge has been of counsel for either party to a cause, is considered as a disqualification, and in some States it is made so by statute. In an Ohio case it was decided that while the fact that the only judge residing in the judicial district was formerly of counsel in the cause, was not, under the statute as it existed at that time, ground for the removal of the cause, yet the court recognized that there was an obvious impropriety in the judge's sitting at the trial of a case in which he had been counsel ; that no judge formerly of counsel, who properly appreciates his duty, and has a proper regard for the impartial administration of justice, will for a moment hesitate to decline the service, without at least the consent of all the parties to the action.[1] A judge who has been a material witness for one of the parties on a former trial is disqualified from sitting.[2]

[1] State *ex rel. v.* Winget, 37 O. S. 153. To the effect that when the judge has been of counsel, disqualifies. See Sumner Co. *v.* Tp., 39 Kan. 137 ; State *v.* Hocker, 15 So. 581. The fact that the judge was at one time attorney for some defendants in a cause in relation to matters disconnected with the case on trial, does not disqualify him. Carr *v.* Fife, 156 U. S. 494.

[2] Insurance Co. *v.* NcLeod, 40 Kan. 54.

CHAPTER XV.

OF THE TRIAL BY THE COURT.

SEC.
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SEC. 282. Cases triable to court without jury.—All issues of law must be tried by the court,[1] and all issues of fact in all cases other than issues of fact arising in actions for the recovery of money only, or specific real or personal property, are tried to the court, except in the latter, a jury trial of such actions be waived, in which case these actions would also be triable to the court.[2] Where the right to a jury is waived the parties then make it a trial to the court.[3]

The principles which mark the distinction in the method of trial have been sufficiently discussed elsewhere,[4] and the rules governing the trial of cases by the court without the intervention of a jury will be here cnnsidered.

SEC. 283. Court may order issues tried to the jury.—The court, in those cases falling solely within its province to try, without the intervention of a jury, is authorized by the code of procedure to submit "any issue to be tried by a jury, or referee."[5] The court may submit specific issues of fact in cases in equity, reserving to itself the power to make its own finding upon consideration of the evidence and the verdict,[6] the verdict in such

[1] R. S., sec. 5130.
[2] R. S., sec. 5130.
[3] Miltimore *v.* Bottom, 28 Atl. 872 (Vt.).
[4] *Ante*, secs. 249–254
[5] R. S., sec. 5131.
[6] Saint *v.* Guerrerio, 30 Pac. Rep. 335; 17 Col. 448.

cases being only advisory and not conclusive, and may be disregarded.[1]

Sec. 284. Trial procedure is not materially different.—There is no material difference between the method of procedure in trials to the court, and trials to court and jury. The provisions of the code relating to trials by jury, apply, so far as they are in their nature applicable, to trials by the court.[2]

There is no difference so far as the opening and closing is concerned, as that is governed by the state of the pleadings in all cases, and the burden of proof follows the opening and closing.

As it is incumbent upon the court to find the facts as well as the law, the most important duty imposed upon counsel is to see that the record is properly made up, in the event the case goes up to a higher court. The finding of facts which the code requires the court to make, upon request of one of the parties, what it shall include, and how questions of fact and law are to be prepared for review by a higher court, are matters which require careful attention on the part of counsel. The practitioner should be constantly on the alert to lay the foundation for error on the other side, and its avoidance on his part.

Sec. 285. Conduct of judge.—When the court becomes the trier of fact he is bound to conduct himself in as careful, prudent and impartial manner as are the body of our peers. He should not absent himself while testimony is being delivered, nor allow his attention to be distracted so as to prevent his hearing the same. It has been held, however, that if he should be absent during the delivery of evidence, which is not taken by the stenographer, it will be immaterial so long as there is no controversy about the facts to which it related.[3] The judge should also refrain from making remarks giving impressions as to views which may lead attorneys to take a different course in the trial from what they otherwise would have taken. For example, it would be erroneous to state that he did not care to hear more evidence upon certain matters as it would not affect his decision, if the party by reason thereof was misled and did not offer additional important testimony, which left the opposite side with a preponderance, and warrants a new trial.[4]

Sec. 286. Admission of evidence in trials to court.—There is in fact no difference in the rules of evidence governing the

[1] Burt *v.* Rynex, 48 Mo. 309.
[2] Whittaker's Code, sec. 5206.
[3] Crook *v.* Hamlin, 24 N. Y. Supp. 543.
[4] Harrison *v.* Harrison, 48 Kan. 443.

admission or rejection of evidence in trials to a court without a jury, than in trials to a jury, excepting in the character and degrees of evidence prevailing in equitable actions which are different from those in legal actions; and there is sometimes more freedom or relaxation of rules in trials to the court than to a jury.

It is said that the admission of irrelevant testimony is discretionary with the court.[1] A loose practice prevails in trials to the court of admitting evidence subject to exception, to be considered by the court with reference to its competency or relevancy, upon the final hearing, and if found to be incompetent it refuses to consider it, or not allow it to have any weight in the decision of the case. This is a very common practice, but whether it is correct is doubtful. It is true that courts have a very large discretion over the delivery of evidence, over the order in which it shall be received, and frequently allow testimony of doubtful competency to be introduced upon a promise that it will be made competent, but there is certainly no discretionary power to admit, even under exceptions, evidence which is entirely incompetent. A judge should be extremely cautious and careful in the admission of evidence, and be careful not to allow his mind to be burdened with testimony which is not at the time of its offer clearly competent, and he should be satisfied in his own mind before admitting it, that it is proper. A judge should be so conscientious that he should not want to run the risk of having his mind prejudiced by incompetent testimony, and it is just as easy for him to decide this question at once in trials without a jury as in trials with a jury. But this is not always done, and two rules have been formulated to protect parties from the loose practice of admitting evidence under exception. One rule is that as the court is familiar with the rules of evidence it should be presumed that upon the final hearing the incompetent evidence would be disregarded.[2] Again, it is considered that its admission will not be so prejudicial as to constitute error and warrant a reversal of the judgment of the trial court if the judge states in his finding that he did not consider the evidence in arriving at his conclusion.[3] These rules could be safely applied where the evidence of doubtful competency is merely of a cumulative character,[4] or where it is of very slight

[1] Mobley *v.* Charlotte, &c., R. Co., 20 S. E. 83; 33 Neb. 146.

[2] Standard Accident Insurance Co. *v.* Friedenthal, 27 Pac. 88.

[3] Loomis *v.* Stuart, 24 S. W. 1078; Railway Co. *v.* Turner, 1 Tex. Civ. App. 625; Kleinmann *v.* Geiselmann, 114 Mo. 437; Stabler *v.* Gund, 35 Neb. 648; Douglas *v.* Duncan, 66 Tex. 122; Smith *v.* Lee, 82 Tex. 124; Mitchell *v.* Beckman, 64 Cal. 117; Barth *v.* Green, 78 Tex. 678.

[4] Hill *v.* Smith, 25 S. W. 1079; 6 Tex. Civ. App. 312.

probative value,[1] or where there is nothing in the finding of facts which shows that the court was influenced thereby,[2] or where there are no conclusions of law and fact when it is presumed that the incompetent evidence was disregarded,[3] or where there is other competent evidence sufficient to support the finding of the court.[4] But where the obvious effect of testimony offered is to prejudice the party against whom it is offered, and the chances of its ever becoming material, as proof of any comp tent fact, are slight, it should at once be rejected.[5]

Sec. 287. How the record is made up so as to disclose errors in admission of testimony, and in the finding of the ultimate facts by the court.—If there is error in the admission or rejection of testimony in trials to the court without a jury, a bill of exceptions is necessary to bring up the testimony and disclose it, the same as in trials to the jury. After the court hears all the testimony, it makes either a general or special finding of the ultimate facts, and applies the law thereto. In the absence of a special request the finding will be a general one, and upon a request it will be a special finding.

A general finding is a mere finding of the facts for the plaintiff or defendant, generally which is incorporated in the journal entry. A special finding is a finding of the ultimate facts from the evidential facts which are incorporated in the journal entry, and must be a finding of facts to which the law gives a determinate effect, conclusive of the issue.[6]

Where all of the facts found are incorporated in the journal entry, and there is no claim that such finding is not supported by the evidence, but it is only claimed that they are not sufficient in law to support judgment, and there is no complaint as to the admission or rejection of evidence, then all the facts are on the face of the record, and no bill of exceptions is necessary, and the only way to review such judgment is by noting an exception to the finding and judgment in the journal entry, and filing a petition in error, and taking up a transcript of the journal entries and the original papers.

If it be claimed that the special finding is not supported by the evidence, then it is necessary to take a bill of exceptions in which the evidence is incorporated, and that a motion for a new trial be made, incorporating therein as one of the grounds, that

[1] Baker *v.* State, 15 S. E. 788; 90 Ga. 153.

[2] Mullaly *v.* Noyes, 26 S. W. 145.

[3] Evans *v.* Martin, 25 S. W. 688; 6 Tex. Civ. App. 331.

[4] Markell *v.* Matthews, 32 Pac. 176; 3 Colo. App. 49; Laumeier *v.* Gehmer, 110 Mo. 122; Gould *v.* Railway Co., 15 N. Y. Supp. 895; Victoria Copper Min. Co. *v.* Haws, 27 Pac. 695; Richardson *v.* Doty, 25 Neb. 420.

[5] Calvin *v.* State, 12 O. S. 60, 70.

[6] Leach *v.* Church, 10 O. S. 149.

the finding is not supported by the evidence, except to the entry of judgment, and incorporate the motion for a new trial in the bill of exceptions. There can be no complaint whatever on account of an alleged defect in a finding of fact, that it is not supported by the evidence, unless it be called to the attention of the trial court by a motion for a new trial, and exceptions be taken as to the sufficiency of the facts found.[1]

Sec. 288. When general finding to be made.—The court, in trials without a jury, in the absence of a request by one of the parties, need only make a finding generally for the plaintiff or the defendant.[2] Such a finding is substantially the same as a general verdict of a jury;[3] it stands as a general verdict, and final judgment may be rendered thereon with all the presumptions in favor of its validity.[4] If a party desires to take an exception to the judgment for the purpose of a review, it must be shown in the entry. A party against whom an issue is found in this mode of trial, cannot stand by when the entry is made, make no objection to its form, and afterward seek to avail himself of inaccuracies or inconsistencies in the statement of the steps by which the court reached its conclusion, a statement which the law declares unnecessary, when no exception is proposed. It will be sufficient, therefore, when no exception is entered, if the record substantially shows, all that the law requires, a general finding of the issue for one of the parties and the proper judgment thereon.[5] In the absence of all showing to the contrary, the general finding and judgment will be presumed to include all issues made in the case not specially passed on.[6]

Sec. 289. When special findings must be made—Request.—The codes of some States require that the finding of the court in cases tried without a jury must be in writing and contain the statement of the facts found separately from its conclusions of law, but do not consider that this is mandatory, and hence not prejudicial if not complied with.[7] In the Ohio and other codes one of the parties to a suit may, with a view of excepting to the decision of the court upon the questions of law involved in the trial, request the court to state in writing the conclusions of fact found, separately from the conclusions of law. The request must be made at or immediately after trial.[8] This provision is one of importance, and is in no sense directory. When a party

[1] Carpenter *v.* Warner, 38 O. S. 416.

[2] R. S., sec. 5205.

[3] Elliott's Gen. Pr., sec. 968.

[4] Kilgore *v.* Emmitt, 33 O. S. 410, 418.

[5] Franks *v.* State, 12 O. S. 1, 7, 8.

[6] Kilgore *v.* Emmitt, 33 O. S. 410.

[7] Stepp *v.* N. L. & M. Co., 16 S. E. Rep. 134; Cole *v.* Stock Assn., 52 N. W. Rep. 1086; 3 S. D. 272.

[8] Whittaker's O. Civ. Code, sec. 5205; Okla. Code Civ. Pro., Art. 1, c. 70, sec. 1. A request eight days after trial, but before the journal entry is filed, is too late. Toledo *v.* Barnes, 1 O. N. P. 187.

requests the court to state separately its conclusions of law and fact, a refusal so to do will be prejudicial and cause for reversal unless it should appear from the record that the party was not prejudiced thereby.[1] The object of this provision is to give a party a right to a special finding, by requesting it with a view of excepting to the judgment. But the court may do so without a request; an exception to the judgment is as available as if it were made at the instance or request of the party making it.[2] A request for a special finding is necessary, and when made and refused, an exception to such refusal should be duly entered to be available on error.[3] The request may, under certain circumstances, be refused, as when it is not supported by any evidence,[4] or where it presents any immaterial issues.[5] But if the evidence tends to support the allegations there should be a finding.[6]

Sec. 290. Finding prepared by counsel for prevailing party.—It is customary and proper for counsel for the prevailing party to prepare the findings in accordance with the decision announced orally, and such is the general practice.[7] Such a statement is of course not binding on the court, and the facts are finally settled by the court.[8]

Sec. 291. Separating conclusions of law and fact.—While the code provides that the court, in its findings, shall state in writing the conclusions of fact found, separately from the conclusions of law,[9] yet it will be immaterial, and not ground for reversal, if a conclusion of law is placed under the head of conclusions of fact.[10] And where the evidence fully warrants the findings of the court it need not state in writing its conclusions of fact found separately from its conclusions of law, where all the evidence on which the finding is based is set out in the bill of exceptions.[11] If request be made for separate findings of law and fact, and the court only makes a finding of law, it is erroneous,[12] though a finding of fact will not be erroneous if the conclusion of law is not stated in terms, where it necessarily follows a certain state of facts found.[13] Objections to irregularities in this particular to

[1] Oxford Tp. *v.* Columbia, 38 O. S. 87; Thompson *v.* Russell, 32 Pac. Rep. 56; 1 Okla. 225.

[2] Harner *v.* Batdorf, 35 O. S. 113; Jennings *v.* Jennings, 56 Ia. 288.

[3] Valley Lumber Co. *v.* Hogan, 85 Wis. 336; 55 N. W. 415; Wells *v.* McGeoch, 71 Wis. 196.

[4] Schierloh *v.* Schierloh, 25 N. Y. Supp. 676; 72 Hun, 150; Rogers *v.* Duff, 31 Pac. 836.

[5] Schuler *v.* Eckert, 51 N. W. 198; 90 Mich. 165.

[6] Samuel *v.* Allen, 33 Pac. 273; 98 Cal. 406.

[7] English *v.* English, 35 Pac. Rep. 1197; 53 Kan. 173.

[8] Bateman *v.* Blaisedell, 83 Mich. 357.

[9] Whittaker's O. Civ. Code, sec. 5205.

[10] Wells *v.* Yarbrough, 19 S. W. Rep. 865; 84 Tex. 660.

[11] Street Railway Co. *v.* Street Ry. Co., 6 O. C. C. 362.

[12] Callaghan *v.* Grenet, 66 Tex. 236.

[13] Miller *v.* Hicken, 92 Cal. 229.

be available must be made at the time and exception be duly noted.[1] The objections should be specific either to the conclusion of fact, or law, or both.[2]

Sec. 292. Of what the findings shall consist.—The code merely provides that the court shall state its finding in writing—its conclusions of fact separately from the conclusions of law,[3] and its particular form is not further prescribed. The finding by the court is a substitute for and stands in lieu of a verdict of a jury, and it has even been held that it need be no more specific than the verdict of the jury upon the same pleadings.[4] This may be applicable to a general finding, but it cannot be the case in a special finding. The finding is incorporated into and made part of the entry or judgment, which is itself regarded as a statement within the meaning of this provision of the conclusions of the court.[5] The opinion of the court in deciding the case in which the facts and law are stated generally, cannot by bill of exceptions be made a substitute for the separate statement of conclusions of fact and law found so as to meet the requirement of this provision.[6] But when a bill of exceptions is taken of the whole proceeding, and the opinion is attached thereto as an exhibit, the reviewing court on examination of such record will not reverse the judgment, unless it appear that the plaintiff in error was prejudiced by omission to comply with the request for the statement of the findings of the court.[7]

It is only the ultimate or final facts which are properly deducible from the evidenciary facts which the court must include in its finding. Neither evidence nor argument should be included.[8] The finding should not be evasive of the issues,[9] and should cover or include all the material issues essential to the judgment which is entered; a failure so to find will not support the judgment,[10] though this is not so if there be a failure to make a finding upon immaterial issues.[11] A finding not based upon the

[1] Fitzhugh *v.* Land Co., 81 Tex. 306; Railway Co. *v.* Dickason, 29 N. E. Rep. 775; 130 Ind. 164.

[2] Blair *v.* Blair, 30 N. E. Rep. 1076.

[3] Code, sec. 5205.

[4] Rhodes *v.* Thomas, 48 N. W. Rep. 886; 31 Neb. 848.

[5] Levi *v.* Daniels, 22 O. S. 38.

[6] Transportation Co. *v.* Blanchard, 31 O. S. 650; Gray *v.* Field, 19 W. L. B. 121; Johnston *v.* San Francisco, &c., Union, 75 Cal. 134; 7 Am. St. Rep. 129.

[7] Gray *v.* Field, 19 W. L. B. 121.

[8] Nolan *v.* Grace, 30 N. W. Rep. 173 (Minn.); Minnich *v.* Darling, 36 N. E. Rep. 173; 8 Ind. App. 539; Leach *v.* Church, 10 O. S. 148; Van Slyke *v.* Hyatt, 46 N. Y. 259. It has been held that if it be intermingled with statements of evidence, arguments and conclusions of law it will not be set aside. *In re* Ballard's Estate, 31 Pac. Rep. 1119.

The court need not make finding as to the evidence given in the case. Spore *v.* Vaugh, 20 N. Y. Supp. 152; 65 Hun, 622.

[9] Railroad Co. *v.* Dufore, 95 Cal. 615.

[10] Foster *v.* Devinney, 44 N. W. Rep. 479; 28 Neb. 416.

[11] Callanan *v.* Gilman, 107 N. Y. 360; 7 Am. St. Rep. 831.

issues raised in a case is of no force.[1] A fact admitted by the pleadings upon which no evidence is offered should be so stated.[2] When the court fails to make a finding upon all of the material issues essential to the rendition of a judgment, a bill of exceptions may be taken which may set out what the issues were so as to bring them before the reviewing court.[3]

Sec. 293. Judgment on finding of facts.—The finding of facts and law is part or becomes the judgment of the court. No judgment can be rendered upon a finding of facts which is in the nature of evidence only, and is not in law conclusive upon the questions at issue.[4] Judgment cannot be rendered upon a finding unless the facts found are sufficient in law to warrant the same.[5]

Sec. 294. Remedy for insufficient findings.—The object—stated in the statute—of making a request for a special finding of facts is for the purpose of enabling the party to except to the decision of the court upon the questions of law involved. If the party is satisfied with the finding of facts, but is dissatisfied with the conclusion of law, an exception only need be taken in the entry to enable the party to review the case on error. If a party is dissatisfied with either the general or special finding, or desires to object to the sufficiency of the finding of fact, he must make a motion for a new trial on the ground that such findings are contrary to the evidence or is not supported by the evidence. The overruling of the motion for a new trial, the finding resembling a verdict of a jury, forms the basis of error proceedings. To take the case up in such case the party must embody all the evidence in a bill of exceptions. If a party fails to make objections at the time (and this should be by motion for a new trial) to the sufficiency of the facts found, he cannot raise such objections upon error.[6] If a finding be faulty in that it is too general and comprehensive, and does not respond to the questions of fact, the party objecting must except to the finding on that account.[7] An exception merely to the conclusions of law on the facts found, admits that the facts are fully and correctly found.[8] The appropriate remedy for an insufficient finding is to take an exception and file a motion for a new trial.[9] After

[1] Newby *v.* Myer, 44 Kan. 477.
[2] Oliver *v.* Moore, 23 O. S. 473.
[3] Foster *v.* Devinney, 44 N. W. 479; 28 Neb. 416.
[4] Leach *v.* Church, 10 O. S. 149.
[5] Springer *v.* Avondale, 35 O. S. 620.
[6] Carpenter *v.* Warner, 38 O. S. 416.
[7] Levi *v.* Daniels, 22 O. S. 38.
[8] Bell *v.* Corbin, 36 N. E. 23; Gardner *v.* Case, 13 N. E. 36; 111 Ind. 495.
[9] Radabaugh *v.* Silvers, 35 N. E. 694; 135 Ind. 605; Tewksburry *v.* Howard, 37 N. E. 355; 138 Ind. 103; Bunch *v.* Hart, 37 N. E. 537; 138 Ind. 1; Hilgenberg *v.* Northup, 33 N. E. 786.

the findings have been made and entered of record the trial court has no power to change, modify or amend them upon motion.[1] If it be claimed that a finding is against the weight of evidence, the question can only be raised by a motion for a new trial.[2] Where the findings of fact fairly admit of a construction which will support the judgment, that construction should be adopted rather than one which would render the judgment erroneous.[3] A judgment on a special finding without request may be reviewed even though not made at the request of either party.[4]

Sec. 295. Trial of agreed cases by the court.—The code provides that: Parties to a question which might be the subject of a civil action, may, without action, agree upon a case containing the facts about or upon which the controversy depends, and present a submission of the same to any court which would have jurisdiction if an action were brought; but it must appear by affidavit that the controversy is real, and the proceedings in good faith, to determine the rights of the parties; and the court shall, thereupon, hear and determine the case, and render judgment, as if an action were pending.[5]

It is obvious, therefore, that it was intended that there should be a real case submitted between the parties. It does not authorize the submission of questions in cases that are merely anticipated, nor of cases where the facts are in dispute, nor is the submission intended to be advisory as to the rights of the parties. It is rather a substitute for an action, and its effect upon the rights of the parties is the same as that of an action. It is a short and convenient mode for the final settlement of a case submitted.[6]

Sec. 296. Same, continued—Parties. All persons interested in the controversy must be made parties,[6] though there cannot be any complaint that all the necessary parties were not before the court after the cause has been taken to a reviewing court.[8]

Sec. 297. Same, continued—A substitute for special verdict.—It is said that an agreed case stands in lieu of or is a substitute

[1] *Id.*; LaFallette *v.* Higgins, 129 Ind. 412; Hartlepp *v.* Whiteley, 129 Ind 576; Barner *v.* Bayless, 33 N. E. 907; 134 Ind. 600; Levi *v.* Chittenden, 22 N. E. 92; 120 Ind. 37; Wunderlin *v.* Cadogan, 17 Pac. 713; 75 Cal. 617. But see Gardner *v.* Case, 13 N. E. 36; 111 Ind. 495.

[2] Gardner *v.* Case, 13 N. E. 36; 111 Ind. 495; Hilgenberg *v.* Northup, 33 N. E. 786.

[3] Jack *v.* Hudnall, 25 O. S. 255.

[4] Harner *v.* Batdorf, 35 O. S. 113.

[5] Whittaker's O. Civ. Code, sec. 5207.

[6] Railroad Co. *v.* Perry Co., 30 O. S. 120.

[7] Hobart College *v.* Fitzhugh, 27 N. Y. 130; Wood *v.* Squires, 60 N. Y 191.

[8] Burr *v.* Bates, 3 O. C. C. 1; s. c. 3 Oh. Civ. Dec. 1.

for a special verdict,[1] and is subject to like rules. That is, all of the facts necessary to a determination of the case must be definitely ascertained. The facts must be stated, and not merely the evidence of facts. If there be any ambiguity, or any omission of facts necessary to a recovery, the judgment cannot stand.[2]

Sec. 298. Same, continued—The affidavit.—As appears by the provision of the code an affidavit must be filed that the controversy is real. This affidavit is a necessary prerequisite to conferring jurisdiction upon the court to hear and determine the case.[3] A statement signed by the attorney only and not sworn to, is not sufficient to give the court jurisdiction.[4] While the affidavit is essential to clothe the court with jurisdiction, yet it has been held that where all the parties interested in the construction of a will agree, as petitioners, to submit the question to the decision of the judge, the court may take cognizance of the case as an application by the executor for the construction of the will so as to enable him to dispose of the fund in his hands.[5] It has been held that the affidavit required by this provision cannot be made by an attorney.[6]

Sec. 299. No pleadings necessary.—An agreed case under the code does not require any pleadings or particular form, and if filed should be disregarded.[7] It is elsewhere held that the rule of pleading facts is applicable to the statement of facts required for the submission of a controversy.[8]

Sec. 300. Form of Submission.—

Court of Common Pleas, ——— County, Ohio.

(*Caption.*)

Your petitioners respectfully represent to the court that they have existing between them a controversy; that they have agreed upon a case containing the facts upon which the controversy depends, and without action, herewith present a submission of the same to the court upon the following agreed statement of facts, to-wit:[9] The parties hereto pray that this court may hear and determine this case and render its judgment herein, &c.

[1] Brown *v.* Mott, 22 O. S. 149, 150.

[2] Gage *v.* Gates, 62 Mo. 412; Shaw *v.* Padley, 64 Mo. 519; Sawyer *v.* Corse, 17 Gratt. 230.

[3] Myers *v.* Lawyer, 99 Ind. 237; Manchester *v.* Dodge, 57 Ind. 584; Godfrey *v.* Wilson, 70 Ind. 50.

[4] Reeder *v.* Warkman, 37 S. C. 413.

[5] Ruffin *v.* Ruffin, 112 N. C. 102.

[6] Bloomfield *v.* Ketcham, 5 N. Y. Civ. Pro. 407; s. c. 95 N. Y. 657.

[7] Building and Loan Assn. *v.* Hougland, 90 Ind. 115; Olds *v.* Tucker, 35 O. S. 581, 586.

[8] Brownell *v.* Greenwich, 114 N. Y. 518.

[9] Here follow with statement as in Railroad Co. *v.* Commissioners, 30 O. S. 120, or as in Bates on Pleadings, p. 229.

AFFIDAVIT.

The State of Ohio, ——— County, ss.

A B, C D and E F, parties hereto, each being severally sworn, say that the controversy hereby submitted is real, and that this proceeding is brought in good faith to determine the rights of the parties.

Sec. 301. Withdrawal of case.—Where a case has been submitted upon an agreed statement of facts, reduced to writing and signed by the consent of the respective parties, such statement cannot be withdrawn or the agreement retracted by either party except by leave of the court on cause shown.[1]

Sec. 302. Record in an agreed case.—The case, the submission, and the judgment shall constitute the record.[2] Where, however, the record shows pleadings, and an issue and trial by the court, and a general finding, though the facts are agreed upon in writing, with an affidavit annexed showing that the controversy is real, it is not an agreed case, but the agreement is simply evidence, and is no part of the record unless made so by a bill of exceptions.[3]

Sec. 303. Judgment in an agreed case.—The judgment shall be with costs, and may be enforced in the same manner as if it had been rendered in an action, unless otherwise provided in the submission.[4] It has the same force and effect as a judgment rendered in an ordinary case.

Sec. 304. Reviewal of agreed case.—Where a case has been presented to the court upon an agreed statement of facts, no motion for a new trial, or bill of exceptions, is contemplated as necessary. The facts being agreed upon, there is no question for decision except the law as it arises upon the agreed facts.[5] Where, however, the issues joined in a case submitted for trial, either to the court or jury, upon an agreed statement of facts, a motion for a new trial is required, and the agreed statement of facts must be made part of the record, just as other evidence, either by bill of exceptions, or by an order of the court.[6] The judgment rendered by the court is subject to reversal in the same manner as if it had been rendered in an action, unless otherwise provided in the submission.[7] The statement made in an agreed case excludes all questions except such as arise on the facts stated.[8]

[1] Ish *v.* Crane, 13 O. S. 574.

[2] O. Code, sec. 5208.

[3] Pennsylvania Co. *v.* Neblack, 99 Ind. 149.

[4] O. Code, sec. 5209.

[5] Brown *v.* Mott, 22 O. S. 149, 150; Fisher *v.* Perdue, 48 Ind. 323; Lofton *v.* Moore, 83 Ind. 112.

[6] Lofton *v.* Moore, 83 Ind. 112; Slessman *v.* Crozier, 80 Ind. 487.

[7] Whittaker's O. Civ. Code, sec. 5209.

[8] Boston *v.* Tileston, 11 Mass. 468.

CHAPTER XVI.

TRIAL BY REFEREES.

SEC.
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SEC. 305. What cases may be referred.—The right to a trial by a referee is secured by provision of the code, vesting the court with authority to direct a reference in any case in which the parties thereto are not entitled as matter of right to a trial by jury, whether the parties consent to such reference or not.[1] In other words, the court may direct a reference of chancery cases, or cases triable to court without a jury, without the consent of parties. All other cases, viz., those in which the parties are entitled as matter of right to a trial by jury, may be referred by the court, upon the written consent of the parties, or upon oral consent in open court, entered upon the journal.[2] In the latter class of cases—actions at law—the court is authorized to direct a reference only upon condition that the parties waive their right of trial by jury and consent to a reference.

SEC. 306. Purpose and object of this mode of procedure.—The purpose of this mode of procedure is to provide a more convenient mode of trial for such cases as are of a complicated nature, and which cannot be so conveniently tried either to the court or to court and jury. Many cases may arise on the law side of

[1] R. S., sec. 5211.

[2] R. S., sec. 5210.

the court which are of too complicated a nature to submit to a jury, they may consume too much of the time, and as such cases cannot be referred to a master commissioner, this mode of reference is provided for this class of cases whenever parties so desire and consent.

Equity cases may be tried either to a referee or to a master commissioner. In a trial by reference, the parties may have three referees if they desire, while in trials to master commissioners, there can only be one master, and frequently cases are of such magnitude that parties would much prefer submitting their case to three referees of their own selection than to a court.

Sec. 307. Nature of the trial before referee.—The code provides that the trial by the referees shall be conducted in the same manner as a trial by the court.[1] The trial before the referees should be followed by all of the incidents of a trial by the court. Referees, under the code, possess judicial functions, with the exception that they have not the power to render judgment nor to issue execution, but otherwise they possess all the authority of the court which appoints them. This must follow from the language of the code, which provides that when the *whole issue*, and by that is presumably meant both issues of law and fact, is submitted to them, that their report thereon shall stand as the decision of the court, and judgment may be entered thereon in the same manner as if the action had been tried to the court.[2] In equity cases the referees are substituted for the court, and in law cases they are substituted for court and jury, and where both issues of law and fact are referred, their conclusions of law and fact stand as the decision of the court, and if not set aside judgment follows, of course. All questions that may arise as to the admission or rejection of evidence, questions of the competency or relevancy, or of the form of questions, or of the order of admission of testimony, or as to striking out evidence, are made in the same manner as in a trial to the court, and are to be decided by the referees.[3] As a trial before referees proceeds according to the established rules of law and practice, the rules of evidence governing courts on the trial of ordinary actions apply to the hearing before the referees, the referee passing on the admissibility of testimony.[4] None but competent evidence should be received therefore, though the reception of immaterial evidence may not be of

[1] R. S., sec. 5213.

[2] R. S., sec. 5213; The Wesleyan Cemetery *v.* Woodruff, 2 Disney, 216; Guthrie *v.* Milling Co., 17 O. C. C. 259.

[3] Cincinnati *v.* Cameron, 33 O. S. 336.

[4] Mason *v.* Knox, 27 Atl. 305; Mutual Life Ins. Co. *v.* Anthony, 4 N. Y. S. 501; Guthrie *v.* Milling Co., 17 O. C. C. 259.

itself cause for reversal.[1] Exceptions to the admission or rejection of evidence on account of its competency or relevancy, to be available on error, must be taken and entered on the trial before the referees as in other cases.[2] And if incompetent evidence has been admitted it should be stricken out on motion.[3] The supreme court of the State of Wisconsin has adopted a rule that in passing on a case tried by a referee, all competent testimony taken by the referee will be considered, and all improper evidence will be rejected without regard to objections and rulings made by the referee.[4]

Amended or supplemental pleadings may be filed in the cause while pending before the referees as in the trial court,[5] though this rests within the discretion of the referee, as it does with the court.[6] The referee may also enforce the attendance of witnesses.[7]

Sec. 308. Distinction between a reference to a master commissioner and to referees.—A master commissioner is only appointed in cases in which the parties do not have the right to a trial by jury. Referees may be appointed in cases where the parties do have the right to a jury trial, by consent, and in cases where the right to a jury trial does not exist, without the consent, but upon the application of a party, or by the court of its own motion. A master commissioner must reduce the testimony to writing, and report the same to the court, with his conclusions of law—and the facts involved in the issues. The referee does not reduce testimony to writing and report it, unless the court specially directs it to be done.[8] The report of the referee, when not directed to report the testimony, is a mere finding of facts and conclusions of law—without the testimony, so that the court could not determine—as it could in the case of the master commissioner—whether the findings were correct, unless the testimony was reduced to writing and filed with the report, or unless the parties brought it up as they may do, by a bill of exceptions. The trial before a referee, as we have before observed,[9] is conducted precisely as before the court, the referee having power to decide upon all questions of the admissibility of evidence; but such is not the case in trials before a master commissioner; he is merely required to reduce the testimony to writing, and

[1] Groth *v.* Kirsting, 36 Pac. 156.

[2] Manning *v.* Leighton, 28 Atl. 630; Illstad *v.* Anderson, 49 N. W. 659.

[3] Mason *v.* Knox, 27 Atl. 305.

[4] Kinsey *v.* Archer, 80 Wis. 201.

[5] Cincinnati *v.* Cameron, 33 O. S. 336, 356; Ry. *v* Lockwood, 33 Fla. 573; McLaughlin *v.* Webster, 141 N. Y. 76; Guthrie *v.* Milling Co., 17 O. C. C. 259.

[6] Haight *v.* Littlefield, 24 N. Y. Supp. 1097; Hall *v.* Abells, 10 N. Y. Supp. 581.

[7] Guthrie *v.* Milling Co., 17 O. C. C. 259.

[8] R. S., sec. 5213.

[9] *Ante*, sec. 307.

the prevailing view is that he is not empowered to pass upon questions of admissibility of evidence

Sec. 309. Consent of parties must be nad in what cases.—In causes in which the constitutional right to a trial by jury exists, a reference cannot be made unless the parties consent thereto, either in writing, or orally in court, in either of which cases the consent must be entered upon the journal.[1] As parties are authorized by statute to waive, in a prescribed manner, their right of trial by jury, there is no obstacle in the way of consenting to a reference in such cases. It must be remembered that the waiver of trial by jury, as well as the consent to the reference, should be made in the manner pointed out by the statute, and it is the better practice, as a matter of course, to incorporate in the entry of reference both the waiver of trial by jury and the consent to the reference. A party may by his conduct waive both the right of trial by jury, and the want of consent, where it is essential to the reference, in making a reference. For instance, if a party appears before a referee where the reference has been irregularly made, and over and against the objections of such party, and without protest or objection to the jurisdiction of the referee, submit his cause upon the issues and proofs, he must be considered to have waived the right to a jury trial, and the irregularity in the reference without his consent. Having thus embraced and enjoyed an opportunity of obtaining a favorable decision from the referee, it is but just and right that he should be held to have waived his objection to the manner in which the reference was made, as well as his right to demand a jury.[2] Nor can a party on whose motion a reference is made, after the cause has been heard by the referee, and his report has been made, have the report set aside on the ground that the order of reference was made without the consent required by the code.[3]

A reference cannot be ordered by the probate court, unless by consent of the parties to the reference, and the referees.[4]

Sec. 310. Entry ordering reference by consent.—(*Caption*).

This day came the parties, plaintiff and defendant herein, and waiving their right to a trial by jury and filed herein their written consent that this cause be referred to referees to report their decision upon all the issues of fact and law involved herein, and it appearing to be for the best interest of the parties hereto, it

[1] R. S., sec. 5210.

[2] Averill Coal Co. *v.* Verner, 22 O. S. 372.

[3] Kelly *v.* State, 25 O. S. 567. Consent to a reference is presumed in the absence of objections in the record. 6 Neb. 382; Duncan *v.* Erickson, 51 N. W. 1140; 82 Wis. 128.

[4] R. S., sec. 5215.

is therefore ordered that this cause be and the same is hereby referred to [*naming referees*] for the trial of all the issues of fact and law involved in said cause. It is further ordered that the said referees reduce all the testimony of the witnesses to writing and require them severally to subscribe the same, and that they make report of their decision to this court without delay.[1]

Sec. 311. When compulsory reference may be made.—In cases in which the right of trial by jury does not exist, the court, or judge in vacation, may of its own motion, without any application by one of the parties, direct a reference without the consent of the parties.[2] Compulsory references are ordinarily discretionary with the court.[3] If several causes of action are united in one petition, only one of which may be referred by the court without the consent of the parties, and upon his own motion without the application of the parties, there can then be no compulsory reference, but the consent of the parties should be had.[4] Where defendant is in default and the case is referred on motion of the plaintiff, the presumption is that the case was a proper one for reference without consent.[5]

Sec. 312. Compulsory order of reference.—
(*Caption.*)

It appearing to the court that the parties to this action are not entitled to a trial by jury upon the issues raised herein, and that it would be for the best interest of the parties that said cause be referred to referees, it is therefore ordered that said cause be referred to [*naming referees*], who are hereby directed and required to ascertain and determine the facts (and law) and report them to this court without unnecessary delay.

Sec. 313. Scope of investigation.—The scope of the investigation to be made by referees is determined by the order of reference. In cases in which parties have the right to a trial by jury the code provides that "all or any of the issues . . whether of fact or of law, or both, may be referred by the court."[6] In the provision relating to cases in which the parties have not the right to a trial by jury, the statute simply says that the court may direct a reference, without further specifying whether of issues of law or of fact or of both, and it must be broad enough

[1] Note.—This may be varied if reference is merely to report the facts.

[2] R. S., sec. 5211.

[3] Maxwell *v.* Cottle, 25 N. Y. Supp. 635; Farmers' L. & T. Co. *v.* R. R. Co., 61 Fed. 546.

[4] Peabody *v.* Cortada, 21 N. Y. Supp. 680.

[5] Schwartz *v.* Linington, 18 N. Y. Supp. 879.

[6] R. S., sec. 5210.

to confer power upon the court to refer either or both issues of law and fact, and the section relating to the report of the referees would seem to be broad enough to make it the duty of the court to refer the issues of both fact and law, as that section requires the referee to state the facts found and the conclusions of law, separately.[1] And there is a rule adopted by the courts that where an order directs that a cause be referred with the usual powers without further particular designation, the presumption is that all the issues of fact and law or both are referred.[2] It is probably within the discretion of the court to make such references in chancery cases as it might see fit, but it is not likely that it would make any reference other than to find the facts alone, or the facts and law.

Sec. 314. Referees—How chosen.—In all cases of reference, except where an infant is a party, the parties may agree upon a suitable person or persons, not exceeding three, and the reference ordered accordingly; and if the parties do not agree, the court shall appoint referees, not exceeding three, who shall be free from exception.[3]

Sec. 315. Irregularities in making reference.—Even though a case not properly referrable is submitted to a referee for trial, such irregularity is cured by the parties appearing before the referee and submitting their cause upon the issues and proofs.[4] Indeed any irregularities in making the reference will be considered as waived unless objected to and an exception taken thereto, as for example, appointment of a referee before the issues are made up.[5] The appearance before the referee waives any objection on account of irregularities; the parties will be considered as having acquiesced in the order.[6]

Sec. 316. Order or commission issued to referee.—

ORDER OF REFEREE.

The State of Ohio, —— County, ss.

To W. M. R., Esq., Greeting:

Whereas, in a certain action now pending in our court of common pleas, wherein J. W. F. is plaintiff, and T. F. W., G.

[1] R. S., sec. 5213.

[2] Illstad *v.* Anderson, 49 N. W. 659.

[3] O. Code, sec. 5214.

[4] Coal & Oil Co. *v.* Verner, 22 O. S. 372; Langerman *v.* McAdam, 26 N. Y. Supp. 755.

[5] Butler *v.* Cornell, 148 Ill. 276; Wheeler *v.* Ralph, 4 Wash. 617.

[6] Cudd *v.* Williams, 39 S. C. 452; Shain *v.* Peterson, 99 Cal. 486 (order of reference without consent); Joshua Hendy Mach. Works *v.* P. Cable Const. Co., 99 Cal. 421.

J. W. and J. B. D., defendants, at a term commencing on the —— day of ——, A. D., —, the following order was entered on the journal of said court:

By consent of parties this case is referred to W. M. R., as special master, to take testimony upon the issues joined between the parties in the case to be decided, and to state an account between the parties, and report the testimony with his conclusions thereon of law and fact to this court.

You are therefore commanded to well and faithfully hear and examine said cause, and make a just and true report therein in accordance with said order.

Witness, L. E. M., clerk of our said court, and the seal thereof, at the city of Cleveland, this —— day of ——, A. D. —.

L. E. M., *Clerk.*

Sec. 317. Oath of referees.—The referees must be sworn well and faithfully to hear and examine the cause, and to make a just and true report therein, according to the best of their understanding; the oath may be administered by any person authorized to take depositions.[1] Where parties proceed to trial, produce testimony and no objections are made, the failure of the referee to take the prescribed oath will be deemed to be waived.[2]

Sec. 318. Form of oath of referee.—

State of Ohio, ——— County, ss.

W. M. R., referee in the said action of J. W. F. *v.* T. F. W., *et al.*, being duly sworn on his oath says that he will well and faithfully hear and examine said cause, and make a just and true report therein, according to the best of his understanding.

W. M. R.

The above was signed by said W. M. R. in my presence, and sworn to by him this —— day of ——, A. D., ——, before me.

W. R. C., *Deputy Clerk of said Court.*

Sec. 319. Report of referees.—The principle that the majority regulates judicial action applies to trials before referees, hence the report of a majority of referees constitutes their judgment.[3]

Sec. 320. Notice of hearing before referee.—We have seen that the trial before the referee is followed with all the incidents

[1] O. Code, sec. 5217.

[2] Garrity *v.* Hamburger, 21 N. E. 743; 5 Neb. 126; Whalen *v.* Boardoc, 6 How. Pr. 278; Keator *v.* U. & D. P. R. Co., 7 How. Pr. 41.

[3] Wesleyan Cemetery *v.* Woodruff, 2 Disn. 216.

of a trial in a court of justice. It is fundamental that no man should be deprived of his property without due process of law; this involves a notice of the proceeding, and it is consequently the duty of a referee in a trial before him to give due and proper notice to all of the parties in interest of the time and place of the hearing, to the end that parties may be given an opportunity to take part in the hearing, introduce evidence, object to evidence offered by the adversary, and note exceptions to the wrongful admission of evidence, and that an opportunity may be given to make a defense. The absence of such notice is such an irregularity as would authorize the court to vacate or modify its own judgment or order whereby the report of the referee is confirmed after the term at which the same is made.[1]

Sec. 321. Referees may summon witnesses, etc.—Adjourn hearing.—Referees are authorized to summon and enforce the attendance of witnesses, administer all necessary oaths in the trial of the case, and to grant adjournments, the same as the court may do.[2] The refusal to grant an adjournment may or may not be prejudicial error according to the facts and circumstances. It has been considered immaterial when there was a refusal to adjourn upon the withdrawal of counsel from the case to afford an opportunity to procure other counsel.[3] And so where an adjournment was refused when requested for the purpose of procuring other testimony when no attempt was made to introduce the testimony.[4]

Sec. 322. Must state facts found and conclusions of law separately.—The code requires that the referees must state the facts found, and the conclusions of law, separately.[5] This is required and can be done only where all of the issues of fact and law are referred.[6] It is the ultimate facts and not the evidential facts that must be stated.[7] If this provision be not complied with, as when evidentiary facts are stated,[8] or the facts are not fully and explicitly stated,[9] or the separate statement is not made,[10] or all the facts are not stated,[11] the case may be sent back or re-referred to the referees with directions to correct the

[1] The Glass-Edsall Paper Co. *v.* The Telegram Publishing Co., 30 W. L. B. 369.

[2] R. S., sec. 5213; Guthrie *v.* Milling Co., 17 O. C. C. 259.

[3] *In re* Tyler, 71 Cal. 353.

[4] Tacoma Grocery Co. *v.* Draham, 8 Wash. 263.

[5] R. S., sec. 5213.

[6] Kent *v.* Ins. Co., 50 N. W. 85.

[7] Cleveland *v.* Dinsmore, 8 Atl. 279.

[8] Cleveland *v.* Dinsmore, *supra.*

[9] Foster *v.* Voigtlander, 13 Pac. Rep. 777; 36 Kan. 572.

[10] Runnels *v.* Moffet, 41 N. W. Rep. 224; Kent *v.* Insurance Co., 50 N. W. Rep. 85.

[11] Schultheis *v.* McQuery, 13 N. Y. 684; Sage *v.* Nichols, 51 Ia. 44.

finding,[1] or the finding may be set aside.[2] If, however, a referee finds an amount due from defendant to plaintiff as a matter of fact, and as matter of law that the plaintiff is entitled to a judgment for the amount, the defendant cannot ask to have the report set aside on the ground that the referee has not made a separate statement of law and fact.[3]

Sec. 323. Steps taken when report is filed in court.—It is said that where all the issues are referred to a referee, the prevailing party need not give notice of the report, or furnish to the other party a copy of it. That a judgment may be entered upon it as upon a verdict of a jury, without a motion.[4] Judgment is not rendered at once upon the return of a verdict; a motion for a new trial is filed within three days from the rendition of the verdict, and usually some time elapses before it is heard by the court. So an opportunity ought to be afforded the defeated party in a trial before a referee to examine the report after it is filed in court, and make his objections to it. The court has the same power to review the decision of the referee as it has over its own judgment.[5]

The manner in which the reviewal of the conclusion of the referee shall be brought about by the trial court is not pointed out. Judgment should not be rendered upon the report until the defeated party before the referee has an opportunity to be heard. If the latter be not satisfied with the findings of fact by the referee, or if it be claimed that the referee has improperly admitted or rejected evidence, a motion for a new trial should be made before the referee, and have his decision upon it, and a bill of exceptions embodying all the testimony taken. Upon the filing of the report by the referee and the bill of exceptions the defeated party may file written objections or exceptions, embracing therein all of the grounds included in his motion for a new trial before the referee.[6] If the exceptions are sustained the court may set the findings aside, and refer the case back to the referee, or it may be tried anew by the court.

If it is only desired to question the conclusions of law made by the referee, and there is no dissatisfaction with the finding of fact, a motion for a new trial would be unnecessary before the referee or in the court, exceptions merely being sufficient.

[1] Cleveland *v.* Dinsmore, 13 N. Y. 684; Schultheis *v.* McQuery, 36 Kan. 572; Foster *v.* Voigtlander, 8 Atl. 279; 22 O. S. 372.

[2] Cemetery *v.* Woodruff, 2 Disn. 216; Maicas *v.* Leony, 113 N. Y. 619.

[3] Riley *v.* Coghill, 1 C. S. C. R. 241.

[4] Riley *v.* Coghill, 1 C. S. C. R. 241; Van Steenburg *v.* Hoffman, 6 How. 492, 493.

[5] Hogg *v.* Beerman, 40 O. S. 81, 100; Lawson *v.* Bissel, 7 O. S. 130, 133.

[6] Guthrie *v.* Milling Co., 17 O. C. C. 259. See Cincinnati *v.* Cameron, 33 O. S. 336.

Sec. 324. Report of referee and judgment thereon when only facts are referred.—When the reference is to report the facts, the report has the effect of a special verdict.[1] The court undoubtedly has more latitude when the reference only includes the facts; the finding in this case is considered in the same manner as the verdict of a jury.[2] It may be set aside when manifestly against the weight of the evidence,[3] but will not be disturbed when supported by evidence.[4] The court being satisfied with the finding, applies the law to the facts found and enters judgment thereon accordingly.[5]

Sec. 325. Judgment upon report when no motion for new trial is made.—This day this cause came on to be heard upon the report of A. B., C. D. and E. F., referees to whom this action was referred, and the motion of plaintiff for judgment in accordance therewith; and it appearing that a motion for a new trial has not been made, it is therefore considered ordered, adjudged and decreed [*follow with order in accordance with the provisions of the report*].

Sec. 326. Reducing testimony to writing.—The evidence is not to be reduced to writing unless the court directs it to be done.[6] But when the court directs it to be done, the referee shall reduce the testimony of the witnesses to writing, and require them severally to subscribe the same.[7] It is essential, however, that the evidence be reduced to writing so as to show any questions raised as to the competency of evidence. Where the referee does not return the testimony, but only notes thereof, the order of reference may be vacated and another referee appointed.[8]

Sec. 327. Reviewal of decision on report of referees.—The code provides that the decision of referees must be given, and may be excepted to and reviewed in like manner as a decision by the court.[9] The referees being officers of the court, the court has a certain supervisory control over the report, and it may be reviewed by the court.[10] As a necessary prerequisite to the reviewal of the acts of the referee, all such exceptions as may be made before the court in the progress of a trial should also be

[1] Whittaker's Code, sec. 5213.
[2] Moulie *v.* Hughes, 28 Fla. 617.
[3] State *v.* Crabtree, 52 N. W. 842.
[4] Schults *v.* Schults, 15 N. Y. Supp. 875.
[5] St. Louis Steam Heating Co. *v.* Bissell, 41 Mo. App. 426.
[6] Lawson *v.* Bissell, 7 O. S. 132–3; Cairns *v.* Hedges, 2 O. C. C. 103, 105; s. c. 1 O. C. Dec. 387.
[7] R. S., sec. 5213.
[8] *In re* Azzeli's Estate, 4 N. Y. Supp. 462.
[9] Whittaker's Code, sec. 5213.
[10] Krapp *v.* Aderholdt, 42 Kan. 247.

taken before the referees,[1] unless the error is manifest upon the face of the record.[2] Exceptions should specifically point out either the findings of fact or conclusions of law excepted to.[3]

If it be desired to review the decision or report upon the ground that it is against the evidence or not sustained by sufficient evidence, a motion for a new trial on that ground should be made before the referee, and upon the same being overruled by the referee, a bill of exceptions can then be taken embodying the testimony, or sufficient to explain it,[4] which must be signed by the referees and returned by them with their report to the court.[5]

If the testimony has been reduced to writing by the referee, Mr. Wild has suggested that it may be proper practice to file a motion for new trial in the court after the report is filed.[6]

As in other cases according to the code provision for new trials, if it be desired to review the finding of fact or law a motion may be filed in the court after the report is filed, and the report or decision may be vacated and a new trial granted, on the ground of any irregularity in the proceedings of the referee, or that the report or decision is not sustained by sufficient evidence, or is contrary to law.[7] If no exceptions are taken to the findings, it cannot be claimed that they are unsupported by the evidence.[8] Objections not made to the report of the referee in the trial court cannot be raised in the higher court.[9] An exception that the finding is against the law and evidence is said to be too general.[10] If the case be one which is reviewable on error, it is taken up upon the overruling of the motion for a new trial as ordinary cases. If it is a case to be appealed, the report of the referees is vacated.[11] Exceptions to a referee's report will be overruled when no motion for a new trial is made before the referee, and no bill of exceptions taken.[12]

Sec. 328. Motion for a new trial.—

(*Caption*).

And now comes C. D. S., defendant herein, and moves the court that the report of A. B., C. D. and E. F., the referees

[1] Lawson *v.* Bissell, 7 O. S. 130; Wesleyan Cemetery *v.* Woodruff, 2 Disn. 216; Riley *v.* Coghill, 1 C. S. C. R. 241.

[2] Wesleyan Cemetery *v.* Woodruff, 2 Disn. 216; Wexelberg *v.* Eberhardt, 1 C. S. C. R. 341.

[3] Central Trust Co. *v.* Railway Co., 57 Fed. 441.

[4] Wexelberg *v.* Eberhardt, 1 C. S. C. R. 341; Lawson *v.* Bissell, 7 O. S. 130, 132.

[5] Whittaker's Code, sec. 5216.

[6] Wild's Journal Entry, p. 66.

[7] Whittaker's Civ. Code, sec. 5305.

[8] Daniels *v.* Smith, 130 N. Y. 696.

[9] Butler *v.* Cornell, 148 Ill. 276; Manning *v.* Leighton, 28 Atl. 630.

[10] Singer Mfg. Co. *v.* Givens, 35 Mo. App. 602.

[11] Lawson *v.* Bissell, 7 O. S. 130. But see when referred to master. Bell *v.* Crawford, 25 O. S. 402.

[12] Hanner *v.* Maumee Brewing Co., 8 Oh. Dec. 399.

heretofore appointed herein and to whom this cause was referred, be vacated and set aside, and that a new trial be granted herein for the following reasons, to-wit: [*Specify as in R. S., sec. 5305.*]

Sec. 329. Entry on motion for new trial.—This day this cause came on to be heard upon the report of A. B., C. D. and E. F., referees herein, of their finding of facts and conclusions of law, and the motion of G. H., the defendant herein, to vacate and set the same aside, and for a new trial of said cause before said referees, and the court being fully advised * does overrule said motion, and finding that said report is in all respects regular, and that the conclusions of law of said referees are in all respects correct, the said report is approved and confirmed; and it is ordered [*make the order in conformity to the report of the referees*].

[*Or from* supra,*] does sustain said motion and order that the said report be and the same is hereby vacated and set aside, and a new trial is granted of said cause. It is therefore ordered that said cause be recommitted to the said A. B., C. D. and E. F. as referees, who are hereby ordered and directed to proceed to a new trial of said cause, and that when they have so complied with this order they shall file in this court a new report of their findings of fact (and law) without unnecessary delay.

CHAPTER XVII.

TRIAL BY MASTER COMMISSIONER.

SEC.
330. Appointment of master.
331. Oath and bond.
332. Issues must be made before reference.
333. Nature of office of master commissioner.
334. What cases may be referred.
335. What is referred to master.
336. Hearing before master.
337. Reporting evidence.
338. Report of master.
339. Procedure when report is filed in court.
340. Hearing upon appeal from judgment on report.
341. Error from judgment upon report.

SEC. 330. Appointment of master.—The court of common pleas may appoint, in each county, such number of persons as may be necessary, to be master commissioners, who hold their office for the term of three years, unless removed by the court for good cause.[1]

SEC. 331. Oath and bond.—Master commissioners, before entering upon their duties as such, must take an oath that they will faithfully perform their duties as such, and must execute an undertaking to the State, with surety to the approval of the court, in such sum as the court shall direct, conditioned that they will pay over all moneys and faithfully perform the duties of the office. Additional security may be required when necessary. The bond must be filed in the county auditor's office.[2]

SEC. 332. Issues must be made before reference.—It is necessary that the issues be properly made up before a case can be referred to a master.[3]

SEC. 333. Nature of office of master commissioner.—Under the code, as under the old chancery practice, a master commissioner is regarded as a master commissioner in chancery.[4] The power of courts to appoint special masters, for the sale of realty, is not taken away by the code. It is not essential, unless the order of the court requires it, that such special master give bond, or take an oath of office.[5] There is no evidence in the code of an intention to deny, or to curtail, the inherent powers

[1] Whittaker's Code, sec. 5219.
[2] Whittaker's Code, sec. 5220.
[3] Holliday *v.* Holliday, 3 S. E. Rep. 80; *cf.* Sullivan, 10 S. E. 1071.
[4] Williams *v.* Stevens, 1 C. S. C. R. 176, 179.
[5] Mayer *v.* Wick, 15 O. S. 548.

of courts to cause the execution of their own orders and decrees, as was done under the former practice by the appointment of special masters.

Sec. 334. What cases may be referred.—The court, or a judge thereof in vacation (in chambers), may, upon motion of a party, refer an action in which the parties are not entitled to a trial by jury, to a regular or special master commissioner.[1] Chancery cases only are referred to a master commissioner, those cases in which parties have a right of trial by jury only being referable to a referee upon consent of parties; such cases, for example, as accounting,[2] to marshal assets,[3] specific performance,[4] or to determine the liability of stockholders.

Sec. 335. What is referred to master.—The master commissioner may be required to take the testimony in writing, and report the same to the court; or he may be required, in addition thereto, to report the same to the court, together with his conclusions on the law and the facts involved in the issues. When he is directed by the order to report the testimony together with his conclusions of fact and law, he must make and report his own deductions of the ultimate facts and conclusions of law thereupon. He may, however, and usually should, report all of the testimony to the court as it is given.[5]

Sec. 336. Hearing before master.—Is conducted in the same manner as the trial before the court. The master is empowered to administer all oaths required in the discharge of his official duties, or authorized to be administered by the laws of the State.[6] He may summon and enforce the attendance of witnesses, and grant adjournment, the same as the court; and when the court directs it to be done, shall require the witnesses severally to subscribe their testimony.[7] The parties are entitled to a notice of the time set for the hearing before the master.[8] Where notice is properly given, and the master adjourns the hearing by request of one of the parties, who, however, finally fails to appear and offer any testimony, or to file exceptions to the report, the cause cannot be re-referred to the commissioner.[9] But if a party never receives any notice of the reference, though he be in default, he may have a decree on the report of a master set aside.[10]

[1] Code, sec. 5222.
[2] Bouland *v.* Corpin, 3 S. E. 219.
[3] W. 261.
[4] W. 706.
[5] Code, sec. 5222.
[6] Whittaker's Code, sec. 5219.
[7] Whittaker's Civ. Code, sec. 5223.
[8] Ballard *v.* Shippman, 32 Fla. 481.
[9] Gould *v.* Banking Co., 36 Ill. App. 390.
[10] Acme Copying Co. *v.* McLure, 41 Ill. App. 397.

The duties and power of the master is materially different from that of a referee; the latter hears the case as a court and passes upon questions of the competency and admissibility of testimony. The master has no such power; he is simply empowered to take the testimony in writing, and report the same to the court.

Sec. 337. Reporting evidence.—The code provides that a cause may be referred to a master "to take the testimony in writing, and report the same to the court, and therewith his conclusions on the law and facts involved in the issues,"[1] which apparently requires that the evidence in every case referred must be taken in writing and reported to the court in that form. Another section, however, impliedly provides by this language, "and when the court directs it to be done, shall require the witnesses severally to subscribe their testimony,"[2] that the master does not have to report the testimony only when so directed by the court. And it is said that where the order of reference does not require the evidence to be reported the same will not be disturbed,[3] and that the finding in such case is unimpeachable and conclusive.[4] If the order requires the testimony to be reduced to writing and returned, which is not done, a party attending and making no objections to the manner of taking such evidence, cannot object thereto after the report is made.[5]

Sec. 338. Report of master.—The master must report the testimony in writing, "and therewith his conclusions on the law and facts involved in the issues, which report may be excepted to by the parties, and confirmed, modified or set aside by the court."[6] The report must therefore show the master's conclusions of the facts involved in the issues, as well as the law upon those facts. While the testimony must be reported, it is only the facts deduced therefrom which should be embraced in the report. The evidence on which the master acted is no part of the report unless made so by order of the court, or by the report itself.[7] The effect of the report is not the same as that of a verdict by a jury, or entitled to the same consideration where the findings are mere deductions from uncontroverted facts. But when the evidence is conflicting it will be considered in much the same light as the verdict of a jury.[8] When attacked on error it is entitled to the same weight and consideration as the verdict of a jury.[9] The court rarely interferes with the report when the

[1] Whittaker's Civ. Code, sec. 5222.

[2] Whittaker's Civ. Code. sec. 5223.

[3] Freeland *v.* Wright, 154 Mass. 492.

[4] Williams *v.* Wager, 64 Vt. 326; Coal, Iron and Ry. Co. *v.* Gordon, 151 U. S. 285.

[5] Johnson *v.* Meyer, 16 S. W. Rep. 121 (Ark.).

[6] Whittaker's Civ. Code, sec. 5222.

[7] Holt *v.* Holt, 37 W. Va. 305.

[8] McConomy *v.* Reed, 152 Pa. St. 42; Fry *v.* Feamster, 15 S. E. 253 (W. Va.); Williams *v.* Stevens, 1 C. S. C. R. 176.

[9] Church *v.* Pennington, 18 O. C. C. 408.

evidence is conflicting, unless errors of law are made;[1] and even when there is no conflict the finding will be sustained unless it plainly appears that it is not warranted by any reasonable view of the evidence.[2] It must be manifestly opposed to or unsupported by the evidence.[3]

Sec. 339. Procedure when report is filed in court.—It is not necessary when the report of a master is filed in court that the cause be set regularly on the trial calendar to be heard upon the testimony taken before the master and such other testimony as may be offered.[4] The statute provides that the report may be excepted to by the parties, and confirmed, modified or set aside by the court.[5] The report is heard, upon the motion of the prevailing party to confirm it, and exceptions by the defeated party (if any are filed).[6] The hearing upon exceptions to the report may be upon the usual day for hearing of motions, or may be specially assigned.

The report may be "confirmed, modified or set aside" by the court in the same manner and to the same extent as was the report of a master commissioner in chancery before the code; it does not stand upon the same footing with the verdict of a jury or finding of a referee in a proceeding at law, to be set aside only on a showing which would warrant the setting aside of a verdict of a jury rendered in a trial at law. His findings are to assist, but not necessarily to control the judgment of the court. Where the court acts upon a master's report, it is to be regarded as declaring its own conclusions of fact and law. It is different from a referee's report in this. A referee's report is more in the nature of the verdict of a jury; the court renders its judgment upon the facts found by the referee.

Exceptions to the report are in the nature of a special demurrer, and should point out with particularity the errors relied upon, or the portion of the report objected to.[7] An objection that "the findings, and each of them are not warranted by the evidence," will not raise any question for review.[8] If the findings of fact be correct, but there is an error in the conclusions of law, no exceptions need be made.[9] But where exceptions are necessary but are not entered, the same cannot be heard in review upon error.[10] A re-reference or vacation of the report

[1] Hartman *v.* Evans, 38 W. Va. 669.

[2] Fry *v.* Feamster, 15 S. E. 253 (W. Va.)

[3] Church *v.* Pennington, 18 O. C. C. 408.

[4] Williams *v.* Stevens, 2 C. S. C. R. 11.

[5] Code, sec. 5222

[6] The hearing of the motion to confirm the report is the matter for determination. 2 C. S. C. R. 11.

[7] Huling *v.* Farwell, 33 Ill. App. 238; Gunn *v.* Black, 69 Fed. 151.

[8] Waska *v.* Klaisner, 43 Ill. App. 611.

[9] Manufacturing Co. *v.* Manfg. Co., 40 Fed. 476.

[10] Baxter *v.* Blodgett, 63 Vt. 629.

will not be necessary where it is inaccurate in some statement of fact, if it does not materially prejudice the party complaining.[1]

Objections may be made that the master made erroneous conclusions of fact, or of fact and law separately. If the objection is to the finding of facts, then the court may look to the original testimony, which the master is required by the statute[2] to report to the court. The court may, as authorized, modify the finding to conform to its views, or may confirm or set it aside.

The conclusion of the court is a final order and reviewable on error,[3] or, the cause being appealable, may be taken up on appeal.

Sec. 340. Hearing upon appeal from jugddment on report.—It is said that the appeal of a cause which has been referred to a master does not vacate the report of the latter; that the case stands for hearing in the appellate court upon the exceptions to the master's report, and for confirmation, modification, or vacation, as it stood in the court below, unless upon some equitable showing the court permits additional testimony to be offered. This rule is confined to cases where the matter referred was ancillary or auxiliary to the determination by the court, the usage of equity courts not being affected by the statute.[4] But the finding of the court as to the main issues are vacated, and the cause stands for trial in the appellate court upon the same issues.[5]

The author is of the opinion that upon an appeal in this class of cases, as in other cases of appeal, the case is transferred to the appellate court for trial *de novo*. But as the testimony is in writing it would seem more convenient to hear the cause in the same manner as did the trial court.

Sec. 341. Error from judgment upon report.—Error or appeal may be prosecuted from the judgment of the trial court upon the report of a master commissioner. It is only cases in which the parties have not the right to trial by jury that are referred to a master, but error or appeal may be prosecuted therefrom. Preparatory to the prosecution of error, exceptions must be filed to the report, and an exception taken to the ruling or judgment of the court thereon, and if the error is apparent upon the face of the record there is then no necessity for a bill of exceptions. But if it is necessary to take the evidence up in order to take the case properly before the reviewing court, then a bill of exceptions is necessary.

[1] McElroy *v.* Swope, 47 Fed. 380.
[2] Sec. 5222.
[3] Teaff *v.* Hewitt, 1 O. S. 511.
[4] Bell *v.* Crawford, 25 O. S. 402; Brooks *v.* Scobie, 1 O. C. C. 348; s. c. 1 Oh. C. Dec. 194; Cairns *v.* Hedges, 2 O. C. C. 103; s. c. 1 O. C. Dec. 387.
[5] *Id.*

CHAPTER XVIII.

OF THE RIGHT TO TRIAL BY JURY.

SEC.
342. Of the right and origin of trial by jury.
343. What is a constitutional jury.
344. Legislature may extend or enlarge, but cannot impair the right.
345. Constitutional guaranty of a speedy trial by an impartial jury.
346. Compensation for private property taken for public use must be assessed by a jury.
347. To what cases the right extends —Right how determined.
348. Nature of relief as determining right to jury trial.
349. Trial of actions for money only.
350. Actions to recover specific real or personal property.
351. What issues to be tried to the court.
352. Actions to foreclose mortgage.
353. Actions to enforce liens.
354. Trial upon equitable or legal counter-claim.
355. Trial of contest of will.
356. When parties treat action as not triable by jury—Effect.
357. Trial when judgment vacated.
358. Trial in bastardy proceedings.
359. Trial of issues in *quo warranto* and *mandamus*.
360. Trial of disbarment proceedings.

SEC. 342. Of the right and origin of trial by jury.—A learned Ohio judge once said: "While there is difference of opinion concerning the origin of trial by jury, the principle of that mode of trial has certainly existed from the time England first had a national existence; and we shall find it still earlier in the tribunals of the Germans, the Danes and the Normans; that is to say, among three of the four elements of our race."[1] It is the same right recognized by *magna charta*,[2] existing in substantially its present form for several centuries, guaranteed and guarded by the ordinance of 1787 and reasserted in our constitutions. And the words of the constitution are not merely the assertion of a general right to be tried before persons selected for the purpose. The right of the accused to an impartial jury cannot be abridged. To secure this right it is necessary that the body of triers should be composed of men indifferent between the parties, and otherwise capable of discharging their duties as jurors.[3] The number must be twelve; they must be impartially selected, and must unanimously concur in the guilt of an accused before a conviction can be had, or a verdict rendered in a civil case.[4] Any act of the legislature providing for trial otherwise than by a common-law jury, composed of twelve men, would be unconstitutional; and any act requiring or authorizing such trial by jury, partial or

[1] McGill *v.* State, 34 O. S. 228, 254, and authority cited.

[2] Creasy's Eng. Const. 202.

[3] Cooper *v.* State, 16 O. S. 328; 23 *Id.* 551; 29 O. S. 186.

[4] Work *v.* State, 2 O. S. 297, 304.

biased against either party, would be a violation of one of the essential elements of the jury referred to in, and secured by, the constitution.[1]

Sec. 343. What is a constitutional jury.—Our constitution merely provides that the right of trial by jury shall be inviolate.[2] The jury designed by this provision was what may be appropriately styled a common-law jury, it being intended to preserve the essential and distinguishing features of trial by jury at common law.[3] A common-law jury means a jury of twelve men, no more nor no less.[4] The meaning of the word "jury," whenever it appears in the constitution, means a tribunal of twelve men, presided over by a court for the purpose of hearing the allegations, evidence and arguments of the parties to an action.[5] Being an appendage of a court, a tribunal auxiliary to the administration of justice in a court, a presiding law tribunal therefore is implied, and the conjunction of the two is the peculiar and valuable feature of a jury trial. A mere commission of twelve men can never be regarded as a jury.[6]

The right is nowhere described or defined in the constitution. It is spoken of as something already sufficiently understood, and referred to as a matter already familiar to the public mind. The institution referred to in our constitution, and its benefits secured to every person, is precisely the same in every respect as that recognized in the great charter and its benefits secured to the freedom of England, and again and again acknowledged in fundamental compacts as to the safeguard of life, liberty and property; the same right brought to this continent by our forefathers, and perseveringly claimed as their birthright in every contest with arbitrary power, and, finally, an invasion of its privileges prominently assigned as one of the causes which was to justify them in the eyes of mankind, in waging the contest which resulted in independence. Nor did their affection for it then diminish or cool. They made it a corner-stone in erecting State governments; and after the adoption of the federal constitution, without a provision securing it, they did not rest satisfied, until they had proposed and carried an amendment, giving to every person accused of crime in the courts of the Union, the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed.[7]

[1] Stokes *v.* People, 53 N. Y. 164, 172; McGill *v.* State, 34 O. S. 228, 254, Okey, J.

[2] Art. 1, sec. 5.

[3] Work *v.* State, 2 O. S. 297.

[4] 2 Hale's Pleas of the Crown, 161.

[5] Lamb *v.* Lane, 4 O. S. 167. The term "jury," without addition or prefix, imports a body of twelve men in a court of justice. Work *v.* State, 2 O. S. 297, 307.

[6] Willyard *v.* Hamilton, 7 Ohio (pt. 2), 111.

[7] Justice Ranney in Work *v.* State, 2 O. S. 303–4.

Sec. 344. Legislature may extend and enlarge but cannot impair the right.—Having adopted the institution precisely as it existed at common law, it follows that the legislature cannot impair or abridge the right of trial by jury as it existed at common law, and that the constitutionality of all legislative enactments with reference thereto is measured or governed by the principles and usages of the common law, excepting however, that the constitutional limitations relate only to the power to abridge or impair, and not the power to extend. The right may be extended, but not abridged. It is immaterial, therefore, what the method of trial was in a given case at common law so long as it comes within the power of extension.[1] It was not therefore intended to restrict future legislative power as to chancery or other proceedings necessary to the ends of justice.[2] The number of jurors cannot be diminished, or a verdict authorized, short of a unanimous concurrence of all the jurors in those cases in which a jury was required at common law,[3] but in any case or proseeding in which a jury was not required at common law, a jury of any number may be authorized within the discretion of the legislative body.[4] As juries formed no part of the machinery of inferior courts, such as justice's courts, at common law, it is within the power of the legislature to provide for a jury of any number. The constitution did not intend any change in this respect.[5] An act providing for a preliminary assessment of damages sustained by a person through whose lands a county public road is proposed to be established, by a board of reviewers composed of three disinterested freeholders who are required to report to the county commissioners, does not impair the right of trial by jury when it is provided that an appeal may be taken,[6] nor does an act conferring jurisdiction upon courts of common pleas to appoint guardians of property of persons incapable of taking care of and preserving their property, by reason of intemperance, conflict with this constitutional provision. This right was recognized and secured by the common law without the intervention of a jury.[7] And there are many offenses prescribed by statute in which the legislature may direct the mode of redress untrammeled by the constitution, such as Sabbath breaking or selling liquor on Sunday. The doctrine of the common law that fines for such minor offenses could be imposed and collected without the intervention of a jury and by magis-

[1] Gunsaullus *v.* Petit, 46 O. S. 28, 29; Cochran *v.* Loring 17 Ohio, 409, 425; Hunt *v.* McMahon 5 Ohio, 133.

[2] Cochran *v.* Loring, 17 Ohio, 409; Hunt *v.* McMahon, 5 O. 133; Cincinnati *v.* Steinkamp, 54 O. S. 279, 284.

[3] Work *v.* State, 2 O. S. 297; Sovereign *v.* State, 4 O. S. 490.

[4] Work *v.* State, 2 O. S. 297.

[5] Norton *v.* McLeary, 8 O. S. 205; Work *v.* State, 2 O. S. 297.

[6] Reckner *v.* Warner, 22 O. S. 275.

[7] Hagany *v.* Cohnen, 29 O. S. 82.

strates, is abundantly established by many cases. But an act authorizing imprisonment in such cases without any means provided for a trial by jury is invalid.[2] And so with an act authorizing a court to declare a turnpike road abandoned and vacated as a toll road, making a free road, without the intervention of a jury or the right of appeal.[3] The constitutional right of trial by jury is not infringed when option is given to the accused in a misdemeanor to have the issue tried by the court or the jury, and he submits the cause to the court.[4]

A statute authorizing a building inspector to assess a fine against an owner for failure to construct fire escapes in accordance with the law, and conferring power upon a court of equity by injunction to prevent the owner from the use of such building, does not take away property, nor deprive the owner of the lawful use of the same and thereby deprive such party from his constitutional right of trial by jury. The owner may sell, mortgage or devise it.[5]

Sec. 345. Constitutional guaranty of a speedy trial by an impartial jury.—To protect the right of liberty and to prevent long imprisonment under various pretexts without being brought to trial, the constitution, State and federal, provides that any one accused of a crime may have the right to a speedy public trial by an impartial jury in the county or district in which the offense is alleged to have been committed.[6]

The right of the accused to an impartial jury cannot be abridged. To secure this right it is necessary that the body of triers should be composed of men indifferent between parties, and otherwise capable of discharging their duty as jurors. Whether, in the practical administration of justice, the right is infringed is, necessarily, a judicial question; and whether, in a particular case, a proposed juror has the state of mind which will render him impartial, is a question of fact which it is the duty of the court, trying the case, to decide. This duty is enjoined by the constitution, and, it is true, cannot be impaired, or the right abridged, by legislative action.[7] It is not the purpose of this constitutional provision that a prisoner should be allowed to avail himself of some technical grounds which may have been the cause of a delay in his trial for the purpose of procuring his discharge. If the statutes have been disregarded before a trial has been had the accused may be entitled to a discharge. This constitutional provision is not violated by a law which permits a juror to remain in the box who, notwith-

[1] Inwood *v.* State, 42 O. S. 186, 188.
[2] Thomas *v.* Ashland, 12 O. S. 124.
[3] Turnpike Co. *v.* Parks, 50 O. S. 568.
[4] Dillingham *v.* State, 5 O. S. 280; Daily *v.* State, 4 O. S. 57.
[5] Cincinnati *v.* Steincamp, 54 O. S. 284, 289.
[6] Const. Art. 1, sec. 10.
[7] Cooper *v.* The State, 16 O. S. 328.
[8] Johnson *v.* State, 42 O. S. 207.

standing the fact that he has an opinion based upon conversations with witnesses of the transactions, or from reading reports of their testimony, will nevertheless say on oath that he believes he could render an impartial verdict, and the court is satisfied that such juror would render an impartial verdict on the whole evidence.[1]

A jury, or a portion thereof, who have sat in the hearing of a cause in which the same testimony is involved as in the cause to be tried, as where the jurors have sat in the trial and conviction of another charged with stealing the same goods, does not seem to be an impartial jury.[2] This provision of the constitution does not require that the trial shall take place within the judicial district.[3]

Sec. 346. Compensation for private property taken for public use must be assessed by a jury.—The constitution guards the right of private property but makes the same subservient to the public welfare. Lands may be taken for public use, but not without assessing a compensation to the owner in money.[4] Where the ownership of land is made an issue either party is entitled to a jury trial,[5] and so is the owner of land entitled to a jury to assess damages sustained by the establishment of a county road;[6] but where in appropriation proceedings neither party is in possession of the property, issues joined between them are not triable by jury.[7] Laws may be enacted which provide for viewers to assess compensation and damages when there is an appeal provided for where a trial by a constitutional jury may be had before the appellate tribunal.[8] Hence if the owner of the land is not satisfied with the allowance made by the viewers, he may have his compensation assessed by a jury upon an appeal, in such appellate court, so that a right to a jury trial is not thereby impaired.[9]

Sec. 347. To what cases the right extends—Right, how determined.—Our constitution, and the practice of the courts, have always recognized the fact that in many cases no right of trial by jury exists. It was never intended that the right should be enjoyed in every possible case, nor was the constitution designated to enlarge or modify the right of trial by jury, but its sole pur-

[1] Palmer *v.* State, 42 O. S. 596.

[2] Morris *v.* State, 58 O. S. 722. It may be, however, that the majority of the court in this, an unreported case, held such a jury to be an impartial jury; if so, it would seem wrongly so.

[3] State *ex rel. v.* McCarty, 52 O. S. 363.

[4] Const., Art. 1, sec. 19.

[5] Railroad Co. *v.* O'Hara, 58 O. S. 343.

[6] *In re* Wells County Road, 7 O.S. 17.

[7] Skenett *v.* Presbyterian Society, 41 O. S. 606.

[8] Reckner *v.* Warner, 22 O. S. 275; Lamb *v.* Lane, 4 O. S. 167; *In re* Wells County Road, 7 O. S. 17. See Willyard *v.* Hamilton, 7 O. (pt. 2) 111; Work *v.* State, 2 O. S. 296, 307; Kramer *v.* R. R. Co., 5 O. S. 140.

[9] Railway Co. *v.* Construction Co., 49 O. S. 681.

pose was to guarantee the perpetuity of the institution as it existed at the time of the formation of the State and adoption of the constitution, and as it had long existed at common law.[1]

The right of trial by jury exists under the code as it did at common law. Prior to the adoption of the modern procedure there were two courts, one of law and one of equity, trials in the former being by jury, in the latter by the court without a jury. When the reformed procedure was adopted, the same court was vested with law and chancery jurisdiction, and the distinction between actions at law and suits in equity was in form abolished. The code provision, however, not only marked and preserved the distinction between the two kinds of actions—law and equity—but also retained the same method of trial as that which prevailed in the common law and chancery courts.[2] It was provided that: Issues of law must be tried by the court, unless referred as otherwise provided; and issues of fact arising in actions for the recovery of money only, or the specific real or personal property, shall be tried by a jury, unless a jury trial be waived, or a reference be ordered.[3] All other issues of fact must be tried by the court, subject to its power to order any issue to be tried by a jury, or referred.[4] Whether an action is to be regarded as one for the recovery of money only, is not determined by the prayer of the petition alone, but depends as well upon the case made, or facts stated in the petition.[5] Section 5130 of the code does not in any manner abrogate the equity jurisdiction of the court. Causes of action clearly falling within its provisions are necessarily removed from the domain of equity. A statute abrogating that jurisdiction must be strictly construed, and if its restrictive purpose is not clear, it will not be extended by construction.[6] The distinction in many cases is of difficult discernment, and depends upon the nature of the relief demanded, which is governed by defined rules discussed in the next section.

Sec. 348. Nature of relief as determining right to jury trial.—The discussion here must bear close relation to the thoughts suggested when considering a constitutional jury. At common law we saw that the right of trial by jury, or to the court, was gauged by legal and equitable principles; and while, as has heretofore been stated, the common-law jury has been ingrafted into our jurisprudence, it must be borne in mind that we are bound to the common-law rules only so far as concerns the impairment or abridgement of the right of trial by a common-law jury in those

[1] Cochran *v.* Loring, 17 Ohio, 409, 425; Inwood *v.* State, 42 O. S. 186, 188.
[2] Kinkead's Code Pldg., sec. 4.
[3] O. Code, sec. 5130.
[4] O. Code, sec. 5131.
[5] Reed *v.* Reed, 25 O. S. 422.
[6] Black *v.* Boyd, 50 O. S. 46, 54.

cases in which the right of trial by jury existed. Beyond that we are free. We are permitted to branch out into new fields and adopt new methods under the power of extension; and in such cases it may be immaterial whether at common law, either party had, upon the issues joined in a given case, a right to a trial by jury, but must only look to the provisions of the code to ascertain whether that right is awarded. This right, therefore, will not depend upon the character of the principles upon which the right to relief may be based, but upon the nature and character of the relief sought. If the relief sought is a money judgment only, and is all that is required to afford a remedy, it is immaterial whether the right of action is based upon what were formerly regarded as equitable, or upon what were regarded as legal principles. In either case the remedy must be sought in the civil action under the code; and trial by jury is given upon all issues of fact where the relief sought is a money judgment only, or is for the recovery of specific personal or real property, all other issues being triable to the courts.[1] When a money judgment will answer the demand of the plaintiff, is all that is sought and all that is obtained, either party is entitled to a jury trial upon any issue of fact joined in the action.[2] Where, however, other relief is required, as the reformation of an instrument, preparatory to a recovery of damages for a breach of it,[3] or, where an order of sale and a distribution of a fund, as in foreclosure,[4] or where an accounting must be had before a judgment may be rendered and is necessary to full and complete relief,[5] then the equitable relief is the principal or primary relief sought, and goes beyond a mere money judgment, and the right of trial by jury in such cases does not exist.[6] So in an action for injunction and incidentally for damages sustained, neither party can demand a jury.[7] That the ultimate relief sought is for money merely, is not necessarily conclusive that the action is one for the recovery of money only.[8] An action cannot be considered as one for money only, within the purview of the code, where to administer full and complete relief therein, it is necessary to invoke the equity powers of the court to adjust accounts between parties.[9] On the other hand, an accounting or other equitable relief, as injunction, between parties, may be only incidentally necessary to a judg-

[1] Gunsaullus *v.* Petit, 46 O. S. 27.

[2] Alsdorf *v.* Reed, 45 O. S. 653, 656; Dunn *v.* Kanmacher, 26 O. S. 497; Chapman *v.* Lee, 45 O. S. 356; Brundridge *v.* Goodlove, 30 O. S. 374; Averill Coal & Oil Co. *v.* Verner, 22 O. S. 372.

[3] Rowland *v.* Entreken, 27 O. S. 47; Ellsworth *v.* Holcomb, 28 O. S. 66.

[4] Ladd *v.* James, 10 O. S. 437–8; Fleming *v.* Kerkendall, 31 O. S. 568.

[5] Reed *v.* Reed, 25 O. S. 422.

[6] Alsdorf *v.* Reed, 45 O. S. 653, 656.

[7] Converse *v.* Hawkins, 31 O. S. 209.

[8] Rowland *v.* Entreken, 27 O. S. 47.

[9] Black *v.* Boyd, 50 O. S. 46.

ment for money, in which case it is one for a jury.[1] In determining the right to a trial by jury, the prayer of a petition cannot safely be relied upon as a guide, but the facts stated therein must be considered in deciding the matter.[2] If one member of a partnership seeks an accounting of their unsettled partnership affairs which are wholly unadjusted, the appropriate remedy is in equity, and the trial must be by the court. But when a partner asks for the recovery of an amount due him and remaining in the hands of another partner upon a final settlement of their accounts, it is then a case to be submitted to the jury.[3]

Sec. 349. Trial of actions for money only.—Issues of fact arising in actions for the recovery of money only must be tried by a jury, unless waived.[4] According to the discussion in the preceding section,[5] when the primary or only relief sought is for money, the case is one for a jury. The meaning of this section is obvious. Difficulty is only encountered when there appears to be two kinds of relief necessary to be granted to furnish an adequate and complete remedy, in which case to determine the appropriate mode of trial, the question as to which is the principal or primary relief must be settled. When this section was first incorporated in the code the word "only" did not appear, but was inserted in the Revision of the Code of 1880. The object or effect of the change of language has never been explained in any adjudication, though the rules now established by the decisions render the solution of the rights of parties to the proper mode of trial in any case easy.

An action to recover the value of lands conveyed away in fraud of creditors must be regarded as one for money, and the party is entitled to trial by a jury.[6] An action for damages on account of a trespass to real estate is an action for the recovery of money only, triable to a jury.[7]

Sec. 350. Action to recover specific real or personal property.—Issues of fact arising in actions for the recovery of specific real or personal property, are triable by jury, unless waived.[8] In an action to recover real property where the plea of not guilty is entered, the issue thereby raised cannot be tried by the court,[9] and in an action by persons claiming to be trustees of an incorporated religious society to recover possession of the real property of the society, an answer denying that the plaintiffs, and

[1] Chapman *v.* Lee, 45 O. S. 356, injunction; Brundridge *v.* Goodlove, 30 O. S. 374.

[2] Reed *v.* Reed, 25 O. S. 422.

[3] Masters *v.* Freeman, 17 O. S. 323.

[4] O. Code, sec. 5130.

[5] *Ante*, sec. 348.

[6] Doney *v.* Clark, 55 O. S. 294.

[7] Gill *v.* Pelkey, 54 O. S. 348, 359.

[8] O. Code, sec. 5130.

[9] Slocum *v.* Lessee of Swan, 4 O. S. 162.

alleging that the defendants are such trustees, presents an issue which is properly triable by a jury.[1] An action brought by one out of possession of land, against a railroad company, claiming title and charging a wrongful entry and possession by the defendant, and asking that the defendant may show his interest therein and that the same be declared null and void, and judgment for the possession of the property is prayed for, and that the defendant be enjoined from interfering with the land until compensation is made, is one for the recovery of specific real property.[2]

Sec. 351. What issues to be tried by the court.—All issues of fact other than those raised in actions for the recovery of money only, or specific real or personal property, or in actions to foreclose a mortgage, or to enforce a lien when personal judgment is asked,[3] must be tried by the court, subject to its power to order any issue to be tried by a jury, or referred.[4] This will embrace an action for the enforcement of a trust, and for an account by the trustee to the *cestui que trust*,[5] or an action to compel the return of an insurance policy assigned under duress,[6] a suit for partition,[7] proceedings for contempt,[8] or a suit to enforce the allowance of a claim by an assignee of an insolvent debtor;[9] or for the reformation of a written instrument even though a money judgment be incidentally asked.[10] In the trial of an action upon a written instrument, the interpretation thereof must be made by the court, and not by the jury.[11] Where issues of fact relating to accounts have been referred to a master who has filed his report, and a motion is pending for its confirmation, neither party has a right to a trial of the same issues to a jury afterward.[12] The issues raised in an action to enjoin waste for an account for waste committed, and also to recover possession, must be submitted to the court.[13] And so are the issues in an action by a party claiming legal title and possession of real property, to determine the interest of another claiming an adverse estate, and to enjoin such party from committing irreparable injury to the property, properly triable to the court, even though the boundary line of the adjoining lands of the respective parties is in dispute.[14] If, however, the defendant in such case claims in his answer that he is the

[1] Presbyterian Society *v.* Smithers, 12 O. S. 248.
[2] Raymond *v.* Railway Co., 57 O. S. 271
[3] O. Code, sec. 5021.
[4] O. Code, sec. 5031.
[5] Carlisle *v.* Foster, 10 O. S. 198.
[6] Windhorst *v.* Wilhelms, 1 O. C. C. 28.
[7] McRoberts *v.* Lockwood, 49 O. S. 374.
[8] Ammon *v.* Johnson, 3 O. C. C. 263.
[9] Merchants Bank *v.* Little, 4 O. C. C. 195.
[10] Ellsworth *v.* Holcomb, 28 O. S. 66.
[11] Monett *v.* Monett, 46 O. S. 30.
[12] Butler *v.* Lee, 2 C. S. C. R. 5.
[13] Jenks *v.* Langdon, 21 O. S. 362.
[14] Ellithrope *v.* Buck, 17 O. S. 72

legal owner and in possession of the land in dispute, but permits the case to be tried to the court without objection, he waives any right to a trial by jury which he might have.[1]

Sec. 352. Actions to foreclose mortgage.—The code provides that in an action to foreclose a mortgage given to secure the payment of money, the plaintiff may also ask in his petition a judgment for the money claimed to be due ; and such proceedings shall be had, and judgment rendered thereon, as in a civil action for the recovery of money only.[2] We have seen that the issues of fact raised in such actions must be submitted to the jury. Therefore, in such actions where personal judgment for the money due is asked, issues of fact relating thereto may be submitted to the jury. The author has discussed this question and reviewed the authorities in a former work to which reference is made.[3] Where personal judgment is not asked, then it is a case for the court.[4]

Sec. 353. Actions to enforce liens.—A like provision is made for actions to forclose liens as in the foreclosure of mortgage.[5] Where the plaintiff asks in such actions for a personal judgment for the money claimed to be due, the same proceedings shall be had as in a civil action for the recovery of money only.[6] This provision is applicable only where the party against whom the lien is sought to be enforced is also personally liable for the debt incurred by the lien.[7] It will embrace actions for the enforcement of a mechanic's or vendor's lien against those personally liable. Where the petition in an action to enforce a lien for an assessment alleges that the defendant is the owner of the lot assessed, but does not allege that he was the owner at the date of the assessment, and prays for the enforcement of the lien, and also for personal judgment for the amount of the assessment, the case is not one in which the parties have a right to demand a trial by jury.[8] In such actions all questions of fact arising on a counter-claim for damages must necessarily on demand be submitted to the jury.[9]

Sec. 354. Trial upon equitable or legal counter-claim or set-off.—The subject of this section has been sufficiently covered in a former section.[10]

[1] Ellithrope *v.* Buck, 17 O. S. 72.
[2] O. Code, sec. 5021.
[3] Kinkead's Code Pleading, sec. 586. Also *ante*, sec. 352.
[4] See *ante*, sec. 251, and other questions there discussed.
[5] *Ante*, sec. 352.
[6] O. Code, sec. 5021.
[7] Fleming *v.* Kerkendall, 31 O. S. 568.
[8] Corry *v.* Gaynor, 21 O. S. 277.
[9] Deeves *v.* Railway Co., 26 N. Y. Supp. 23; 141 N. Y. 587.
[10] *Ante*, sec. 254.

Sec. 355. Trial of contest of will.—The remedy for the contest of a will under the code is a civil action, and the procedure must be conducted in accordance with special provisions relating thereto, without regard to other rules of pleading and procedure when inconsistent therewith. The issue, according to the special provision for contesting a will, must be made up, either in the pleading or by an order on the journal, whether the writing produced is the last will or codicil of the testator, or not, which shall be tried by a jury, and the verdict therein shall be conclusive, unless a new trial be granted, or the judgment be reversed or vacated.[1] The issue prescribed by this statute cannot be varied or restricted by averments in the pleadings, but must be the same, whether made up by the pleadings, or by an order on the journal.[2] An issue must be made up, and tried by a jury, under proper instructions, and final judgment cannot be rendered on demurrer to answer.[3] Where it is apparent upon the face of the will that alterations have been made, the jury must determine from the evidence, if they find it to be a valid will, whether the alterations were made before or after its execution, and establish the will as it read when executed.[4]

Sec. 356. When parties treat action as not triable by jury—Effect.—Where a case has been treated by the parties in the trial court as an equitable action not triable by jury, and it has been so tried upon its merits by the appellate court, the reviewing court will not *sua sponte* consider the question of error in entertaining the appeal.[5]

Sec. 357. Trial when judgment vacated.—In a former work the author pointed out the method of obtaining relief after judgment.[6] In a proceeding to vacate or modify a judgment instituted by a defendant, the court must hear and pass upon the question as to whether the defendant is entitled to the relief; if it be found that there is ground for the vacation or modification of a judgment, and the original action was one which either party would be entitled to demand a trial by jury, the issues should be submitted to a jury. If the original action was one not triable by a jury, then the issues should be submitted to the court.[7]

[1] Whittaker's O. Civ. Code, sec. 5861.

[2] Dew *v.* Reid, 52 O. S. 519.

[3] Walker *v.* Walker, 14 O. S. 157 It is error in the court to proceed by mere decree, without the intervention of a jury, to set the will aside. Holt *v.* Lamb, 17 O. S. 375.

[4] Haynes *v.* Haynes, 33 O. S. 598.

[5] Kershaw *v.* Snowden, 36 O. S. 181.

[6] Kinkead's Code Pldg., sec. 1217.

[7] Watson *v.* Paine, 25 O. S. 340; Kinkead's Code Pldg., sec. 1217.

Sec. 358. Trial in bastardy proceedings.—When a person charged with being the father of a bastard child pleads not guilty to the charge, before the court to which he is recognized to appear, the court is required to order the issue to be tried by a jury.[1]

Sec. 359. Trial of issues in quo warranto and mandamus.—Mandamus is, and has always been, an extraordinary legal remedy; it was not one of the actions at law triable to a jury at common law. It has been held in Ohio that neither party to mandamus proceedings can demand a jury. This is because it does not come within Section 5130 of our code.[2]

It would seem also that proceedings in *quo warranto* would be in precisely the same situation under the Ohio code as mandamus.

Sec. 360. Trial of disbarment proceedings.—In a proceeding to disbar an attorney on account of misconduct, the defendant is not entitled to a trial by jury, but the matter is heard by the court.[3]

[1] Whittaker's O. Civ. Code, sec. 5625.

[2] Dutton *v.* Hanover 42 O. S. 215, 217; Castle *v.* Lawlor, 47 Conn. 340, 342; Chumasero *v.* Potts, 2 Mont. 242; High on Ex. Rem., sec. 30*c*.

[3] Dean *v.* Stone, 35 Pac. 578. *In re* Dellenbaugh, 17 O. C. C, 106.

CHAPTER XIX.

WAIVER OF TRIAL BY JURY.

SEC.
361. In civil cases.
362. In criminal cases.
363. In criminal cases—Capital.
364. In criminal cases other than capital.
365. In criminal cases—Misdemeanors.
366. Waiver, how made—The statute.
367. First way—By consent of party appearing; other party failing to appear.
368. Second way—By written consent filed.
369. Third way—By oral consent.
370. Waiver by conduct or estoppel.
371. Waiver of right, how made in criminal cases.
372. Withdrawal of consent.

SEC. 361. In civil cases.—Parties may waive any right created by constitutional or statutory provision; and though the right of trial by jury is declared by the constitution to be inviolate, it may nevertheless be waived, and it is within the legislative power to provide in what cases and in what manner this may be done. In civil matters it is provided that in actions arising on contract, and in other actions with the consent of the court, trial by jury may be waived.[1] In actions arising on contracts the right of waiver is absolute, while in other cases, it is dependent upon the consent of the court.

SEC. 362. In criminal cases.—One accused of crime cannot waive rights, particularly with reference to procedure, because criminal procedure must be pursued according to the letter of the statute, and nothing can be done except in accord with provisions of law. Penal statutes cannot be enlarged by construction.

There can be no waiver of trial by jury by one accused of crime unless this right is conferred by statute, and in some jurisdictions it has been considered that the right to waive a trial by jury could only be constitutionally conferred in inferior offenses, and that such a right could not be extended to cases of felony.[2] But this does not seem reasonable, and is not the universal rule. In Louisiana and Wisconsin it is held that the right of waiver may be constitutionally conferred in felonies.[3] And in Ohio it is

[1] R. S., sec. 5204.

[2] State *v.* Carman, 63 Ia. 130; 50 Am. Rep. 741; State *v.* Stewart, 89 N. C. 563; State *v.* Holt, 90 N. C. 749; 49 Am. Rep. 544.

[3] State *v.* White, 33 La. Ann. 1218; *In re* Re Staff, 63 Wis. 285; 53 Am. Rep. 285.

said (*obiter dictum*) that as the same constitutional provisions secures a trial by jury in capital cases, also secures it to one charged with a misdemeanor, the constitutional guarantee in the one case is no stronger than in the other, and that there is no reason why a waiver could not be exercised in either class of offenses provided the legislature by statute authorized the court, with the consent of the accused, to hear the evidence and render judgment accordingly. That the reason why the accused cannot waive a trial by jury in a felony is not because of any constitutional obstacle, but because the trial court has no authority in law to try such a case without a jury; that such a mode of trial is unknown to the law. The legislature not having clothed the court with that form of jurisdiction, no act or consent of the accused can confer or create a jurisdiction not established by law.[1] If a statute is necessary to authorize the waiver of trial by jury in civil cases, it certainly would be in criminal procedure.

Sec. 363. In criminal cases—Capital.—There is no statute authorizing one accused of a capital offense, except in cases where the accused be convicted by confession in open court, when the court may hear evidence to determine the degree of the crime.[2] This has been held constitutional.[3] A person charged with murder may waive his constitutional right to a jury by pleading guilty.[4] The statute in Ohio as to this class of cases provides that upon a plea of not guilty, a jury shall be drawn,[5] specifying, too, what shall be a lawful jury.[6]

Sec. 364. In criminal cases other than capital.—In criminal prosecutions for felonies there can be no waiver of trial by jury, as there is no statute authorizing an accused to waive a trial by jury, and by consent submit to have the facts found by the court so as to authorize a legal judgment and sentence upon such a finding.[7]

Sec. 365. In criminal cases, continued—Misdemeanors.—As to persons indicted for a misdemeanor, the statute provides that upon request in writing, properly subscribed by the accused and entered upon the journal, he may be tried by the court.[8] It is within the constitutional power of the legislature to provide that a defendant may at his election try the issue; if the accused may have his choice of two modes of trial, either by the court or jury, and he deems the court the safer mode of trial, and

[1] Craig *v.* State, 49 O. S. 415, 419, 420.
[2] R. S., sec. 7316.
[3] Craig *v.* State, 49 O. S. 415.
[4] State *v.* Almy, 28 Atl. 372.
[5] R. S., sec. 7267.
[6] R. S., sec. 7275.
[7] Williams *v.* State, 12 O. S. 622.
[8] R. S., sec. 7301.

expressly waives the right of trial by jury, and request that the court try the issue, his right of trial by jury is not then violated.[1] Legislation of this kind has been passed. In the procedure in the probate court upon a plea, other than the plea of guilty, if the defendant does not demand a trial by jury, the judge of the probate court must try the case.[2] The accused has his election.

In the prosecution of misdemeanors before mayors of cities and villages, the mayor has final jurisdiction over violations of ordinances and misdemeanors unless imprisonment is prescribed as part of the punishment.[3] If the accused in such cases has a right to demand a jury, the jurisdiction is then co-extensive with the county.[4] The mayor is given the jurisdiction in the two instances just stated, notwithstanding the right to a jury, if before the commencement of a trial the accused waive a jury trial.[5] If imprisonment be a part of the punishment attached to the violation of a municipal ordinance, "and the accused does not waive a jury," the mayor must impanel a jury and try the case.[6]

And so are magistrates given final jurisdiction over certain misdemeanors, it being provided that if a jury trial be not waived, the justice shall cause a jury to be summoned.[7]

Sec. 366. Waiver, how made—The statute.—The statute provides that parties may waive trial by jury in three ways:

(1.) By the consent of the party appearing, when the other party fails to appear at the trial, by himself or attorney.

(2.) By written consent, in person or by attorney, filed with the clerk.

(3.) By oral consent, in open court, entered on the journal.[8]

Unless a written consent be filed with the clerk, or oral consent be given in open court, and be duly entered on the journal, or unless the record shows conduct on the part of the defendant which estops him from demanding a trial by jury without a statutory waiver, a court has no jurisdiction to try the cause.[9]

Sec. 367. First way—By consent of party appearing—Other party failing to appear.—A party who does not appear cannot afterwards complain. He is presumed to know, that by failing to appear the plaintiff may, if he desires, waive the calling of a jury to try the issues and submit them to the court.[10] If the

[1] Daily *v.* State, 4 O. S. 57; Dillingham *v.* State, 5 O. S. 280.
[2] R. S., sec. 6464.
[3] R. S., secs. 1816, 1823.
[4] R. S., sec. 1817.
[5] R. S., secs. 1818, 1828.
[6] R. S., secs. 1819, 1820.
[7] R. S., sec. 7147 (Bates).
[8] R. S., sec. 5204.
[9] Longstreth *v.* Halsey, 4 O. C. C. 311; s. c. 2 Oh. Dec. 563.
[10] Railway Co. *v.* Construction Co., 49 O. S. 681.

plaintiff in replevin fails to appear, the defendant, with the consent of the court, may waive a jury, and the court finding for him may assess damages.[1]

Sec. 368. Second way—By written consent filed.—The second mode of waiver is by written consent filed with the clerk. No particular form need be observed.

Sec. 369. Third way—By oral consent.—When parties are present and give oral consent, it must be in open court, and entered on the journal. A party may waive his right to a jury trial by acts as well as by voice. Where parties, without objection, "submit a cause to the court upon the pleadings, evidence and arguments of counsel," but the entry does not expressly further show that either party demanded or waived a jury, it will nevertheless be considered that there was a waiver of a jury.[2]

Sec. 370. Waiver by conduct or estoppel.—But notwithstanding this statute, which is quite explicit, the right to trial by jury may be waived by the conduct of a party, when the conduct is such as to work an estoppel.[3] Where the parties are present, there must be consent, and, if it be oral, it must be given in open court, and entered on the journal. Where parties without objection submit a "cause to the court upon the pleadings, evidence, and arguments of counsel," this is a consent, even though it is not specifically stated that a jury was waived. If the trial has been proceeded with, and a finding and judgment has been had, it is too late to make objection that the party was entitled to a trial by jury.[4]

Sec. 371. Waiver of right, how made in criminal cases.—There appears to be no mode expressly pointed out in criminal cases, in what manner the right to trial by jury may be waived, in those cases where the right may be exercised. The rules stated in the foregoing section, however, as to waiver in civil cases, may be applicable. In a prosecution under the food adulteration law, it has been considered unnecessary that the waiver should be in writing.[5] The defendant in a police court will be deemed to have waived a trial by jury unless the record shows that he demanded it.[6] A record showing that the accused "did not demand a jury" sufficiently shows a waiver.[7] Failure of a defendant to avail himself of his rights to a jury trial in the

[1] Holkins *v.* Donahue, 2 Clev. Rep. 114.

[2] Bonewitz *v.* Bonewitz, 50 O. S. 373.

[3] Whitworth *v.* Steers, 12 O. C. C. 272; s. c. 4 C. D. 556.

[4] Bonewitz *v.* Bonewitz, 50 O. S. 373.

[5] Martindale *v.* State, 2 O. C. C. 2.

[6] Billingheimer *v.* State, 32 O. S. 435.

[7] Dailey *v.* State, 4 O. S. 57.

trial of a minor offense, should be held to have given consent to trial without a jury.[1]

Sec. 372. Withdrawal of consent.—When, by consent of both parties, a jury is waived, and a cause is submitted to the court, neither party can subsequently withdraw his waiver and demand a jury, unless for special reasons to be determined by the court.[2]

[1] Billingheimer *v.* State, 32 O. S. 441. [2] Hauser *v.* Metzger, 1 C. S. C. R. 164.

CHAPTER XX.

DRAWING AND SUMMONING JURY.

SEC.
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SEC. 373. Introductory—Laws regulating selection of juries not laws of a general nature.—The purpose of this chapter is to collate for convenient reference all statutes in Ohio prescribing the method of drawing and summoning juries in both civil and criminal procedure. With the actual selection and drawing of jurors the lawyer does not usually concern himself, and hence seldom consults the statutes prescribing the mode of procedure, and, as a rule, is unfamiliar with the same. It may at times be of importance to know, however, whether the grand or petit jury is a legally constituted one, and to facilitate the determination of this question this chapter is written. In the course of its preparation some very careless legislation, gross discrepancies and inaccuracies have been discovered, by reason whereof the author is very much impressed with the lack of wisdom in the celebrated decision of McGill *v.* The State,[1] and much more strongly impressed with the wisdom of the masterly opinion of the learned judge who delivered the dissenting opinion in that case. It is a rule of ethics that lawyers are bound to bow submissive obedience to

[1] 34 O. S. 228.

judicial decisions, hence we must concede that as held by the majority in this case, a law regulating the selection of jurors is not a law of a general nature within the meaning of the constitution, though it would seem that in view of the confused condition of existing legislative enactments upon the subject, it would have been far better to have adopted the views expressed in the dissenting opinion in McGill *v.* State. It would have prevented the careless legislation which now appears upon the statutes. It has more recently been held, however, that the right of trial by jury is a subject-matter of general legislation, and laws affecting it must be uniform in operation throughout the State.[1] The act authorizing the common pleas courts to appoint jury commissioners has been held to be constitutional.[2]

Sec. 374. Jury selected according to law in force at time.—It is a well understood rule of construction that the constitutional provision against retroactive laws does not prevent changes in remedial procedure which interferes with pre-existing rights. There can be no such thing as a pre-existing right to a particular remedy or mode of trial. A trial is conducted and juries are selected in accordance with the provisions of law governing the same in force at the time thereof.[3]

Sec. 375. Court to determine number of jurors to be selected.—In all civil, and criminal cases other than capital, the court of common pleas is authorized to determine, at the first term thereof in each year, the number of persons necessary to be selected in each county, annually, to serve as petit jurors in the several courts of such county, in which juries may be required, and cause a memorandum thereof to be entered on the journal. Such order may be made at any other time, and amended at the discretion of the court. In the absence of such determination by the court, the number shall be one hundred and thirty until otherwise ordered.[4]

Sec. 376. Jury wheel to be provided for drawing jurors.—It is made the duty of the county commissioners of every county in the State to provide and place in the custody of the clerk of each county, a wheel so constructed and arranged that by turning the same the pieces of paper containing the names of jurors written thereon and placed therein as provided by law cannot be read or seen until withdrawn from such wheel. This is made

[1] Silberman *v.* Hay, 59 O. S. 582. This related to the selection of the names.

[2] State *v.* Kendle, 52 O. S. 346.

[3] Hartnett *v.* State, 42 O. S. 568; Warner *v.* Railroad Co., 31 O. S. 265. See Green Tp. *v.* Campbell, 16 O. S. 11.

[4] Whittaker's O. Civ. Code, sec. 5162.

the duty of the commissioners of every county by different enactments, and the manner of selection of names of jurors is not uniform in all the counties.[1]

Sec. 377. Appointment and qualification of jury commissioners.— The law prescribing the method of appointment of the jury commissioners for the selection of jurors, was first enacted March 29, 1881,[2] and made applicable to each county having a city of the first grade of the first class, which included the county of Hamilton only. By the same enactment the county clerk, county treasurer and county auditor were empowered to select the jurors in the county of Cuyahoga, to be placed in the jury wheel the same as by the jury commissioners in the county of Hamilton. The appointment of the jury commissioners was to be made by the judges of the court of common pleas, and of the superior court, in joint session. Prior to that, in all of the counties, as well as in these two counties, the method of selecting jurors was by the trustees of each township and the councilmen of each ward in cities. This was prescribed by section 5163 to and including section 5167.

The next change in the system of selecting jurors was made March 16, 1887,[3] by adding, any county containing a city of the first grade, second class, which referred to the county of Franklin, and authorized the judges of the court of common pleas to appoint commissioners of juries.

The next change was made by amendment, April 26, 1890,[4] by adding thereto, and authorizing the judges of the court of common pleas in any county containing a city of the second or third grade of the first class, or of the first grade of the second class, which includes the county of Lucas, to appoint jury commissioners.

By the amendment of April 6, 1892,[5] the judges of the court of common pleas in any county containing a city of the first or second grade of the second class, which included the county of Montgomery, were likewise authorized to appoint three jury commissioners.

On March 25, 1891, a special act was passed which authorized the county commissioners of any county having a city containing a population exceeding thirty-three thousand, according to the federal census for the year 1890, to provide and place in the custody of the county clerk a jury wheel, as in the other counties. This act was made to apply specially to the county of Mahoning, and it authorized the judges of the court of common

[1] Whittaker's O. Civ. Code, p. 174, sec. 1, p. 177, sec. 5189*a*.
[2] 78 O. L. 95.
[3] 84 O. L. 93.
[4] 87 O. L. 327.
[5] 89 O. L. 222.

pleas to appoint four jury commissioners with similar functions as in the other laws passed, and made applicable to the other counties.[1]

On April 24, 1893, the legislature introduced and passed a law which was designed according to its title: "To amend section 5189*b* of the Revised Statutes of Ohio, as amended April 26, 1890." Its provisions were that: In any county containing a city of the first class, or the first grade of the second class, the judges of the court of common pleas, and of the superior court in any county containing a city of the first grade of the first class, in joint session, shall appoint three freehold electors as jury commissioners.[2] It will be thus noticed that the last amendment omits the words "second grade" of the second class, which includes Montgomery county. And yet the original section 5189*b*, which by the previous amendment was intended and d d include Montgomery county, as it included counties containing a city of the first or second grade of the second class, which refers to Columbus and Dayton. It appears that provision is made for a jury wheel to be provided in all of the counties of Hamilton, Cuyahoga, Franklin, Lucas, Montgomery and Mahoning, but for some reason when the amendment of April 24, 1893, was made for the appointment of jury commissioners, the county of Montgomery was inadvertently omitted, so that there is no authority for the appointment of jury commissioners in that county.

On April 23, 1894, a law was passed authorizing the county commissioners of every county in the State, excepting the counties of Cuyahoga, Franklin, Hamilton, Lucas, Montgomery and Mahoning, each of which has a special act governing the selection of juries in said counties, so says the law, to provide a jury wheel, and authorizing the judge or judges of the court of common pleas, of each subdivision of the judicial district, or a majority of them, in joint session, to appoint four jury commissioners for the selection of jurors as stated in the next succeeding section.

By these various enactments, therefore, it was intended that there be appointed in every county in the State jury commissioners whose duty it is to select jurors in the several counties, as is provided by law, except in the county of Cuyahoga, where the county clerk, county treasurer and county auditor are authorized to perform the same duties as the jury commissioners.

It is made the duty of the court, or, in his absence, the clerk of the court, before the commissioners enter upon the discharge

[1] 88 O. L. 200. [2] 90 O. L. 254.

of their duties, to specifically direct their attention to the law, and to instruct and caution them respecting their duties.

The commissioners are required to take the following oath:

"I do solemnly swear or affirm that I will honestly and faithfully discharge the duties of commissioner of jurors without fear or favor, and that I will consent to the selection of no person as juror whom I have been solicited to name as juror, or whom I believe to be unfit for that position, or likely to render a partial verdict in any cause in which he may be called as a juror, and that I will report to the court the names of any and all persons who, in any manner, seek by request, hint or suggestion to influence me in the selection of jurors. And this I do as I shall answer unto God" (*or*, "And this I do under the pains and penalties of perjury").

A jury commissioner duly appointed and acting as such, is a *de facto* officer, and his acts are valid, although he may not be a freeholder.[1] Provision is also made that if either of the commissioners be sick or absent from the county, the presiding judge of the court of common pleas may appoint some judicious and disinterested person to take the place of such commissioner in making the selection of jurors.[2]

Sec. 378. Selection of jurors by jury commissioners and other officers.—In all of the counties in the State except Cuyahoga, the jury commissioners select the jurors. In Cuyahoga county the functions of the jury commissioners are performed by the clerk of the court of common pleas, county recorder and county auditor. In all of the counties other than Cuyahoga, Franklin, Hamilton, Lucas, Montgomery and Mahoning, there are four jury commissioners, who are required to meet on the fourth Monday in May in each year, at the office of the county auditor, at 10 o'clock in the forenoon. In the counties excepting as above, there are three members of the jury commission,[3] and in Cuyahoga county, the clerk, recorder and auditor are required to meet on the second Monday of May of each year, at the office of the auditor, at 10 o'clock a. m. It is the duty of the jury commissioners and the county officials as above named, to select at such meeting, such number of judicious and discreet persons having the qualifications of electors of such county, as the court may direct,[4] to be selected as nearly as may be from the several wards and townships in proportion to their respective population; but no person shall be selected who is

[1] Ickes *v.* State, 16 O. C. C. 31.
[2] Whittaker's O. Civ. Code, pp. 176,
[3] Whittaker's Code, p. 178.
[4] *Ante*, sec. 378.

not in the judgment of all of said commissioners, or said officers, competent in every respect to serve as a juror.[1]

Sec. 379. Names of jurors written out and placed in wheel, how.—When the commissioners or the officers have made the selection of the names of jurors, it is then their duty to personally ascertain whether the jury wheel provided for the county commissioners is entirely empty. When that is done the names of the persons so selected by the jury commissioners must be written by the county clerk on separate pieces of paper, which must be put into the jury wheel and securely locked therein in the presence of the commissioners, or officers in Cuyahoga county. The commissioners or officers must at the same time make and sign a certificate containing all of said names, which they must certify to be the names of the persons selected at the time and place above mentioned, to serve as jurors for the ensuing year, and that they are the same names as those placed in the wheel, which certificate must be filed with the clerk.[2]

Sec. 380. Wheel to be locked—Custodian of wheel and key.—When the names are placed in the wheel and locked therein, the same must be securely locked at all times except when, by order of court, it is necessary to put names into it, and to draw them from it in the manner provided. The clerk is made the custodian of the wheel, and it is made a misdemeanor for any one to unlock or open the same except by order of court.[3]

Sec. 381. Commissioners required to meet by order of court at other times.—Whenever it may become necessary the commissioners, or the officers in Cuyahoga county, may be required to meet, by order of court, at such times and place as the court may appoint, and there select such a number of persons as the court may by its order direct. The names of such persons must be selected, written and deposited in the wheel, in the same manner as provided at a regular meeting.[4]

Sec. 382. Jurors drawn by clerk in presence of sheriff—Venire for jurors.—When the first act was passed establishing the system of selecting jurors by jury commissioners[5] it was provided that whenever the clerk of any county is directed by the order of court, of record therein, or any judge in vacation, to cause any

[1] Whittaker's Civ. Code, p. 179, as to Cuyahoga, Franklin, Hamilton, Lucas, Montgomery and Mahoning counties. *Id.*, p. 165, as to all other counties.

[2] Whittaker's Civ. Code, pp. 179, 175.

[3] Whittaker's Code, pp. 179, 175. This applies to all of the counties.

[4] Whittaker's Code, pp. 176, 179, 180. *Ante*, sec. 379. This applies to all of the counties.

[5] 78 Oh. O. L. 96.

number of persons to be summoned to serve as grand or petit jurors in such court, he shall at once, in the presence of the sheriff, and the court, or a judge thereof, proceed to turn the jury wheel until the pieces of paper placed therein containing the names of jurors selected by the jury commissioners or officers, are thoroughly mixed, and shall then draw therefrom the number of names specified in the order of court, and shall forthwith, unless otherwise directed by the court or judge, issue a *venire facias* to the sheriff, commanding him to summon the jurors whose names were so drawn, to attend as jurors at the time and place specified in said order, and all grand and petit jurors shall be impaneled.[1] The same provision was made in the statute providing for jury commissioners in all of the counties of the State other than the counties of Cuyahoga, Franklin, Hamilton, Lucas, Montgomery and Mahoning.[2] The same provision is contained in the special act made applicable to Mahoning County.[3]

Section 5167 of Revised Statutes relating to drawing and summoning grand and petit jurors should have been repealed when sections 5163, 5164, 5165, 5166 were repealed, as the jury commissioner law renders it inoperative. It relates to receiving the lists of jurors selected by the township trustees and councilmen provided for in old section 5164.

A venire for a petit jury should not contain a panel for a grand jury also.[4]

Sec. 383. Drawing jury for special term.—Section 5168 of the Revised Statutes being enacted before the passage of the jury commission law, no doubt has reference to the old system of selecting and drawing juries, but may be construed so as to authorize the clerk to draw from the jury wheel the names of twelve persons to serve as petit jurors, or twenty-seven persons to serve as grand and petit jurors, for a term of the common pleas court, when so ordered by the court as therein provided.[5]

Sec. 384. Drawing jury for circuit court.—Whenever an issue of fact, which the law requires to be tried by jury, is joined in the circuit court, the clerk of the circuit court is required, at the instance of either of the parties, in the manner as other juries are drawn, to draw the names of twelve persons to serve as jurors in the trial of such cause, and issue the venire for the appearance of the jurors at the proper time and place.[6] This provis-

[1] Whittaker's Civ. Code, p. 180.
[2] Whittaker's Civ. Code, p. 176.
[3] 88 O. L. 200, 201.
[4] Forsythe *v*, State, 6 O. 19.
[5] Whittaker's Civ. Code, p. 168.
[6] Whittaker's Civ. Code, p. 168, sec. 5168.

ion of the statutes has not been revised since the change in the system of selection of jurors, but the presumption is that the clerk should draw the names from the wheel in the same manner as in other cases, although it was designed by this section that the clerk should draw the jury as was done under the old system.

Sec. 385. Issuance, service and return of venire.—The old statute provides that the sheriff shall, if the venire be issued in vacation, summon the persons named therein at least ten days before the sitting of the court, and if issued in term time he shall summon them forthwith; he shall indorse on the venire the names of the jurors, and the time and manner of service, and return the same to the clerk forthwith, if issued in term time, or on the first day of the term, if issued in vacation. Service may be made by reading the venire to the person named therein, or by leaving at their usual place of abode a note or memorandum in the form and manner pointed out by statute.[1]

This was the provision of law, however, which related to the old system of selecting jurors, but in all of the acts establishing the jury commissioners and pointing out the mode of procedure it is provided that the clerk shall, immediately after drawing the names from the jury wheel as directed by law, forthwith, unless otherwise ordered by the court or judge, issue a *venire facias* to the sheriff commanding him to summon the jurors whose names were so drawn, to attend as jurors at the time and place specified in the order, and all grand and petit juries shall be impaneled from the persons so selected and summoned in the manner pointed out by law.[2]

A return made by a sheriff as to some of the jurymen named in the venire that they "cannot be found in the county," is equivalent to a return that they "are absent from the county."[3]

Sec. 386. When special venire may issue.—It is provided in the new jury commissioner law that whenever it shall become necessary, the commissioners shall meet at such time and place as the court of common pleas may appoint, and shall there select such number of persons as the court may, by its order, direct; and the names of such persons shall be selected, written and deposited in the wheel and certified to, as at the regular meeting provided for.[4]

[1] R. S., secs. 5169, 5189.

[2] Whittaker's Civ. Code, p. 176, sec. 3; 91 O. L. 76; R. S., sec. 5189*d*; 78 O. L. 96; Whittaker's Civ. Code, p. 180. The first reference referring to the last general enactment, and the latter one referring to the first jury commissioner law. These enactments must necessarily supercede the old sections.

[3] Davis *v.* State, 25 O. S. 369.

[4] Whittaker's Civ. Code, p. 176

This was designed to provide for the issuance of special venires when necessary, and there is similar provision in the special enactments applicable to all of the counties.

It renders the old section 5172, which was passed for the purpose of authorizing a special venire under the old system of selection of jurors inapplicable, at least to a certain extent.

It provides that: When the court, or a judge thereof, deems it necessary to have two petit juries, or when from any cause it becomes necessary to have a new petit jury, or a number of members to fill up the regular panel for the term, the court or a judge thereof, may order not exceeding double the number of names of jurors required therefor to be drawn from the box (it ought to be amended to "wheel") by the clerk, as in other cases; and a venire isued to summon them to appear as may be directed by the court, or a judge thereof.[1]

Sec. 387. When talesmen may be summoned—Civil and criminal.—It is provided that: If, by reason of challenge, or for other cause, there be not present a sufficient number of jurors, summoned as aforesaid (while this refers to the old system of summoning it may properly apply to the manner of summoning under the new law establishing jury commissioners) to make up the panel, whether of the grand or petit jury, or if the array be challenged and set aside, the sheriff shall summon a sufficient number of talesmen to make up the deficiency; or, if there be such deficiency in the grand jury, the court may issue a special venire to the sheriff, commanding him to summon the persons therein named to attend forthwith as grand jurors; and at the close of each term of court all persons who have served on either jury for such term, together with those who are found permanently disabled, disqualified, or not liable to serve, shall be discharged.[2] When it is necessary to summon talesmen, the court, on motion of either party, shall select them and cause to be issued immediately a venire for as many persons having the qualifications of jurors as, in the opinion of the court, may be necessary, which jurors shall be required to appear forthwith, or at such time as may be fixed by the court; but no person known to be in or about the court-house shall be selected without the consent of both parties.[3] This provision may be taken advantage of in capital cases.[4] Whenever a necessity arises for summoning talesmen, it is the duty of the court, on application of either party, to issue a venire containing the names of persons to

[1] R. S., sec. 5172; Whittaker's Civ. Code, p. 169.

[2] R. S., sec. 5171; Whittaker's Civ. Code, p. 169.

[3] R. S., sec. 5173.

[4] R. S., sec. 7275; 89 O. L. 219.

serve as jurors, and if one writ fails to secure the requisite number, to issue other writs, on like application, until sufficient number of jurors is obtained to fill the panel. When the court orders the sheriff to summon talesmen, to which the defendant objected, and immediately, and before the sheriff has taken any steps under the order, applied for a venire under the statute, such application does not come too late.[1] Sections 5171 and 5173 authorizing the court to summons talesmen, while a part of the old system was not repealed. It provides for emergencies so that delay will be avoided. If the names had to be drawn out of the jury wheel, there would likely be great inconvenience and delay, as the jurors drawn might be located a great distance from the county-seat.[2]

Sec. 388. Special venire when sheriff or coroner a party.—It is provided that when the sheriff is interested in a cause in any court of record, the party in interest opposed to that of the sheriff may apply to the court for a special venire, which shall be directed to the coroner in the same manner as it is usually directed to the sheriff. When both sheriff and coroner are interested, or in case of death, resignation or absence of both sheriff and coroner from the county, or in either case, the process may be directed to such discreet, disinterested persons as the court may direct, and the service and return made as ordinarily by the proper officer.[3]

Sec. 389. Jurors, how selected, drawn and summoned in capital cases.—The method of selecting the names of jurors and placing them in the jury wheel, so far as those steps are concerned, must necessarily be the same as in civil cases, and must be governed in the various counties of the State by the different provisions and laws relating to the various counties, as has been previously pointed out. This is so because there is no other special mode of selecting the names of jurors in capital cases. Consequently in all counties other than the counties of Cuyahoga, Franklin, Hamilton, Mahoning and Montgomery, the names of the jurors are selected by the four jury commissioners provided for by law.

In the county of Cuyahoga the names of the jurors are selected by the county clerk, county treasurer and county auditor. In the counties of Franklin, Hamilton, Lucas and Mahoning the names are selected by the three commissioners as provided by law. By mistake or inadvertence there appears to

[1] Railroad Co. *v.* Young, 21 O. S. 518.
[2] Stahl *v.* State, 11 O. C. C. 23, 31.
[3] R. S., sec. 5174; Whittaker's Civ. Code, p. 170.

be no law authorizing commissioners or other persons to select the names of jurors in the county of Montgomery.

But the method of impaneling juries in capital cases is specially provided for in chapter 6, title ii. of the code by sections 7267 to 7275 inclusive, and differs essentially from that employed in obtaining juries in all other cases. Nor are these sections repealed by any of the enactments which have been given so fully in this chapter as to the establishment of the jury commissioner method of selection of juries, otherwise than in substituting the wheel for the box containing the names of electors from which the original panel is to be drawn.[1] We have, then, on account of the omission of the words, "or second" in the amendment of section 5189*b*-3, made April 24, 1893 (90 O. L. 255), no law applicable to the county of Montgomery so far as the selection of jurors is concerned. All of the old provisions of the statutes providing for the selection of jurors by the township trustees and the councilmen in the wards of cities, having been repealed, there is no law which authorizes the judges of the court of common pleas to appoint jury commissioners in the county of Montgomery for the selection of jurors and placing the same in the jury wheel. Just what the result of this legislation is will not be discussed by the author. Since writing this chapter the supreme court has held in the face of the clear omission in the statute that the act was not repealed so far as it related to Montgomery.[2] The section of the statutes, 5189*a*, providing that the county commissioners of each county having a city of the first class, or the first or second grade of the second class (Franklin and Montgomery) shall provide a jury wheel is still in force.[3]

When a person indicted for a capital offense pleads not guilty, the clerk, on the precipe of the prosecuting attorney, shall draw from the jury-box (should be wheel), as in other cases, thirty-six ballots, and issue to the sheriff a venire for the persons whose names are so drawn, for the day fixed for the trial, which shall be served and returned by the sheriff at least fifteen days before that day; and if a person named therein is dead, insane, absent, removed from the county, or not an elector of the county, or has been convicted of a felony and not pardoned, the sheriff shall note the fact in his return.[4]

If in a capital case, a person not summoned as a juror personates one who was returned on the venire, sits at the trial, and joins in a verdict of guilty, the verdict will be set aside.[5] The panel from which the jury in capital cases is to be chosen, is

[1] McHugh *v.* The State, 38 O. S. 155.
[2] State *v.* Wood, 52 O. S. 601.
[3] Whittaker's Civ. Code, pp. 178, 179.
[4] R. S., sec. 7267.
[5] McGill *v.* State, 34 O. S. 228.

made up from the first thirty-six persons summoned who answer to their names, and are free from disqualifications.[1]

Sec. 390. Additional jurors, how secured in capital cases.—If it appear to the clerk, by the return of the sheriff, that any person named in the venire is dead, insane, absent, removed from the county, or not an elector of the county, or has been convicted of a felony and not pardoned, the clerk shall then draw from the box (wheel) a number of ballots equal to double the number of persons dead, absent or disqualified, and issue to the sheriff a venire for them, for the day fixed for the trial, which the sheriff shall serve and return as soon as may be. If it appear to the clerk, from such return, that the names of thirty-six qualified jurors are not in the venires, he shall draw ballots and issue venires, to be served and returned in like manner, till the required number are summoned.[2] A return that they "cannot be found in the county," is equivalent to a return that they are absent from the county, and authorizes the clerk to issue an alias venire.[3] The first thirty-six jurors who answer to their names at the trial, and who are not disqualified[4] shall constitute the panel.[5] But if, upon impaneling the jury, it appear to the court that there are not thirty-six jurors, without disqualifications, summoned and present, the court may, and upon motion of the defendant shall, order the clerk to draw from the box (wheel), as in other cases, a sufficient number of ballots to make the number of competent jurors thirty-six.[6] The right of a defendant to have ballots drawn from the box (wheel) to make the number of competent jurors thirty-six, exists only when the deficiency arises from death, insanity, absence or removal of any of the persons named in the venire. To supply the places of jurors challenged for other causes, talesmen should be called from the bystanders as provided in section 7275.[7]

Jurors summoned as provided by sections 7267, 7268, 7269, or such of them as are not set aside on challenge, together with so many bystanders having the qualifications of jurors as will make up the number of twelve, or, if the whole array be set aside, twelve of such bystanders having the proper qualifications, as may not be set aside on challenge, shall be the lawful jury for the trial of the prisoner charged with an offense the punishment of which is capital. Either party, however, may demand and have a special venire to fill the panel as provided in section 5173

[1] Bach *v.* State, 38 O. S. 664.
[2] R. S., sec. 7268.
[3] Davis *v.* State, 25 O. S. 369.
[4] As to disqualifications, see R. S., sec. 7268.
[5] R. S., sec. 7269; Bach *v.* State, 38 O. S. 664.
[6] R. S., sec. 7269.
[7] Morehead *v.* State, 34 O. S. 212; Bach *v.* State, 38 O. S. 664.

of the statutes.[1] It is not error where one of the panel of the thirty-six jurors summoned is excused on his own application, to refuse to order the sheriff to summon another before exhausting the panel.[2]

Sec. 391. Jurors, how selected, and what shall be a lawful jury in criminal cases other than capital.—In all criminal cases other than capital, the jury is summoned and impaneled according to the provisions of the law relating to summoning and impaneling the jury in other cases, that is in civil actions.[3]

Sec. 392. Continuance of trial after jury drawn.—After a cause has been assigned for trial and a jury for the trial of the cause has been drawn in accordance with law, and the cause for any reason shall be continued to another term of court, the jury so drawn shall be discharged, and a new jury drawn, as provided for the trial of said cause.[4]

Sec. 393. On objection to array sustained, court may make new list of jurors.—Where the objections by a defendant in a criminal case are made to the array of jurors, and are sustained, the court may make out a special venire of twenty-four names upon his own motion, and give it to the clerk, and have such jurors summoned to try the case.[5]

Sec. 394. Copy of panel to be served on defendant in criminal cause.—The statute requires that a copy of the panel of the jury returned by the sheriff shall be delivered to every person indicted for a capital offense, at least three days before the day of trial.[6] A defendant, being charged with murder in the first degree, a copy of the panel of the jury returned by the sheriff was delivered to him, less than three days before the day first fixed for his trial, but at that time the case was re-set for trial more than three days later. The case was then tried, against the objection of the defendant that the copy of the panel was not served on him at least three days before the trial. There was no error in this.[7]

[1] R. S., sec. 7275, as amended 89 O. L. 219; McHugh *v.* State, 38 O. S. 155.
[2] Martin *v.* State, 16 O. 364.
[3] R. S., sec. 7276.
[4] R. S., sec. 7275, as amended 89 O. L. 219.
[5] Jones *v.* State, 14 O. C. C. 35.
[6] R. S., sec. 7273.
[7] Thurman *v.* State, 4 O. C. C. 141.

CHAPTER XXI.

IMPANELING THE JURY—QUALIFICATION AND CHALLENGING JURORS.

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SEC. 395. Right to challenge.—It is said that the right to challenge jurors for cause is a right conferred by common law which cannot be taken away except by express statute.[1]

SEC. 396. Duty of counsel in impaneling jury.—The duty of counsel during the progress of impaneling a jury is one of the

[1] Abbott's Trial Brief, 13.

most important and delicate tasks which may be encountered in a trial. He must remember that he is assisting in the selection of the men who are to decide what shall be the fate of himself and client in the particular suit, and that success may frequently depend or hinge on some incident which occurs at this time. His duty is to get only such men upon the jury as are thoroughly qualified for acting in that capacity. He must necessarily carry in his mind every statutory qualification, so that he may be able to put this knowledge into practical operation easily and quickly. He should not wait to ascertain the disqualifications until the jury are in the box before him, but if he desires to do his full duty, he will begin this work before he reaches that stage and outside of the court room by familiarizing himself with the men who are proposed as jurors, so that he may the more readily ascertain their prejudices and partiality when he stands before them. In making inquiry of jurors to bring out their prejudices and partiality, or other disqualifications, he must exercise great skill and tact, lest he should in some manner ruffle a juror who may finally be considered a competent one and remain on the panel. Such a juror may remember this in the formation of his verdict.

Sec. 397. Impaneling jury is part of trial—Reviewal of acts of court.—The constitution guarantees to parties to actions, civil or criminal, the right to a trial by a fair and impartial jury. That this right may be secured to its fullest extent there must necessarily be no error committed in the selection and impaneling of the jury. To guard against error in this respect there must be some means provided for the correction of any errors which may be made by the trial court, in the same manner as other errors occurring at the trial may be reviewed and corrected upon a reviewal of the proceedings of the trial court by a court of error. The fulfillment of the constitutional guaranty presupposes a right to have errors corrected by a reviewing court. It is provided by the code that only errors of law occurring at the trial or appearing in the pleadings or judgment can be reviewed.[1] The solution of the question as to whether or not errors occurring in the selection and impaneling of the jury may be reviewed and corrected by a reviewing court depends upon the definition of a trial within the meaning of this provision—when does the trial commence and when is it completed? It has been decided that the trial commences with the impaneling of the jury;[2] that it was the legislative intention that all errors of law occurring at the impaneling of the jury by the court, whether the word *trial*,

[1] R. S., sec. 7356.

[2] Palmer *v.* State, 42 O. S. 596.

alone, does or does not include such impaneling.[1] But before the acts of the trial court in overruling a challenge of a juror may be considered by a reviewing court it must appear from the record that the party complaining made objections and saved exceptions;[2] and the record must show the examination upon the *voir dire* of the qualifications of the juror.[3] If it appears from the record that the party complaining made no objections the presumption arises that he was satisfied, and that the requirements of the law have been complied with.[4] If a challenge to a juror has been improperly overruled and an incompetent juror is accepted by the court, the constitutional requirement is not complied with, and a verdict and judgment may properly be reversed, though a judgment will not be disturbed because a challenge of a juror for cause is improperly sustained.[5] Prejudicial error may result from a wrongful overruling of a challenge, while it is otherwise as to an erroneous sustaining of a challenge. In the first instance, an improper juror may be allowed to sit in the panel. While in the second case, although the challenge be sustained and a proper juror rejected, still another proper juror may be selected and no harm is done.

Sec. 398. Some general qualifications of jurors.—Race or color does not disqualify a person from acting as juror in any case[6] so long as he has a competent knowledge of the English language. The jury commissioners, whose duty it is to select the names of jurors, are required to select persons in every respect competent to serve as jurors, and should be familiar with some of the general qualifications of jurors.[7] The first requisite is that the juror should have the qualifications of an elector,[8] and he should also be a resident of the county, although it has been held that the non-residence of a juror will not of itself invalidate a verdict.[9] The special act relating to the selection of jurors in the counties of Hamilton, Cuyahoga, Franklin and Lucas, as well as in all of the other counties of the State, positively requires that the persons selected by the jury commissioners to serve as jurors shall be "judicious and discreet persons, having the qualifications of electors of such county."[10] There are no property qualifications required in Ohio.

The jury commissioners ought to obey the law; if they would select "judicious and discreet persons" and the judges would

[1] Hartnett *v.* State, 42 O. S. 568.
[2] Wareham *v.* State, 25 O. S. 604.
[3] Cooper *v.* State, 16 O. S. 328.
[4] Wareham *v.* State. 25 O. S. 604.
[5] Loudenbeck *v.* Lowry, 4 O. C. C. 65.
[6] 81 O. L. 15; R. S., 4426-3 (Bates).
[7] Whittaker's Civ. Code, p. 175.
[8] Watts *v.* Ruth, 30 O. S. 32; Eastman *v.* Wight, 4 O. S. 156; Shoemaker *v.* State, 12 O. 43.
[9] Hull *v.* Albro, 2 Disn. 147.
[10] Whittaker's Civ. Code, pp. 179, 175. As to who are exempt, see sec. 399, *post.*

not accept frivolous excuses from good men selected as jurors, our juries would reach a higher standard.

Sec. 399. Who are exempt from jury duty.—Public officers, clergymen and priests, physicians, attorneys-at-law, members of the police force, or firemen employed by the authority of a municipal corporation, active volunteer members of companies for the extinguishment of fires organized under and subject to control of a municipal corporation, and persons who serve as active members of such company for five years, and all persons over seventy years of age,[1] are exempt from jury service.

No person is required to serve as a juror more than three weeks in any one year, beginning with the last Monday of April ; and after any person has served two weeks in any year, he may be discharged on motion, but not during the progress of a trial.[2]

The provisions exempting certain persons from service as jurors do not have the effect of disqualifying the persons so exempted, but merely extends to them a privilege which they may waive if they so desire.[3] And if a person so entitled to exemption from service does serve neither party can complain.[4]

Sec. 400. Inquiry should be made by counsel as to competency of jurors—Waiver of objections.—It is generally only possible to ascertain the disqualifications of jurors by making direct inquiry of them. This is the first duty of counsel after those summoned as jurors have taken their seats in the box, and it is one of the most important steps in the progress of a trial. Before the jury is sworn, either party has the privilege and opportunity of advising himself as to the qualification of each juror.[5] As a general rule, failure to make inquiry as to the competency of a juror at the time he is impaneled, constitutes a waiver of all objections to his competency ; it is not enough to take a case out of this rule to show merely that at the time of impaneling the juror the party complaining was ignorant of the fact of his incompetency, or that he believed him to be competent. This rule applies to jurors summoned upon a special venire as well as upon the general venire.[5] One who is complaining of

[1] R. S., secs. 5180, 5189*l*.

[2] R. S., sec. 5189*k*.

[3] Glassinger *v.* State, 24 O. S. 206.

[4] State *v.* Quimby, 51 Me. 395; State *v.* Cosgrove, 16 R. I. 411; Owens *v.* State, 25 Tex. App. 552.

[5] See Elliott, sec. 510.

[6] Kenrick *v.* Reppard, 23 O. S. 333. Failure to make inquiry waives all objections to the competency that could have been ascertained by such inquiry, except such as the court is required to ascertain *sua sponte*. Watts *v.* Ruth, 30 O. S. 32. As to failure to inquire, see Young *v.* State, 23 O. S. 578; Hayward *v.* Calhoun, 2 O. S. 164; Hull *v.* Albro, 2 Disn. 147; Woodward *v.* Sein, 3 A. L. R. 352; Towe *v.* McCarkle, 8 W. L. J. 64; Alm *v.* Andrews Bros. Co., 9 O. C. C. 591.

the incompetency of a juror after trial, must show not only that he was ignorant of the disqualification of the juror, but that he exercised all reasonable diligence before the jury was sworn, by inquiry or otherwise to ascertain whether an objection to the juror existed.[1]

Where it is ascertained, after the trial of a cause is commenced, that one of the jurors sat upon a former trial of the same cause, and the court thereupon offered to discharge the jury and continue the case, but the plaintiff, against whom the former verdict had been rendered, consented to go on with the jury as it was, the plaintiff cannot, after the verdict is again rendered against him, object to its validity on the ground that said juror was on the panel.[2] A prisoner whose life is at stake, however, should not be held to the same degree of diligence as to inquiry with respeet to the qualifications of jurors as a party in a civil action.[3]

Sec. 401. Waiver of challenges.—Not only does a party waive his right to challenge by failing to inquire and to make objections, but so may a party waive his right to challenge to the array by challenging to the polls.[4] A challenge for cause must be considered waived if not made at the time the juror is impaneled, and cannot be made available after verdict.[5] It cannot be made for the first time upon a motion for a new trial.[6] But there can be no waiver when a juror who is disqualified by reason of not being an elector, or is a non-resident, or not possessed of other necessary qualifications, is retained on the panel without the knowledge of the party or his counsel, after reasonable diligence and due inquiry of the juror has been made to ascertain the fact of his competency.[7] It must be shown that neither the party nor his counsel had knowledge of the disqualification of a juror, as knowledge of counsel is knowledge of the client.[8]

Sec. 402. When challenge to the array may be made—Civil and criminal.—A challenge to the array, as distinguished from challenges to the polls, is based upon some ground which would set the whole panel aside. The statute provides that: A challenge to the array may be made and the whole array set aside by the court, when the jury was not selected, drawn or summoned, or when the officer who executed the venire did not proceed as prescribed by law.[9] The privilege of exercising this right of

[1] Eastman *v.* Wight, 4 O. S. 156; Wilder *v.* State, 25 O. S. 555.

[2] Williams *v.* True, 1 C. S. C. R. 321.

[3] State *v.* Williams, 24 W. L. B. 435 (Md.).

[4] Watkins *v.* Weaver, 10 Johns. 107.

[5] People *v.* Sandford, 43 Cal. 29; Tomer *v.* Densmore, 8 Neb. 384.

[6] People *v.* Voll, 43 Cal. 166.

[7] Watts *v.* Ruth, 30 O. S. 32; Hull *v.* Albro, 2 Disn. 147; Kenrick *v.* Reppard, 23 O S. 333.

[8] Parks *v.* State, 4 O. S. 234; Eastman *v.* Wight, 4 O. S. 156.

[9] R. S., sec. 5175.

challenge demonstrates the importance of a thorough knowledge on the part of counsel of every essential step in selecting, drawing and summoning the jury, treated in a former chapter. It has been considered, however, that objections to the array because it has varied in essential particulars from the law in the selection, will not be listened to nor received after challenge for cause.[1] No challenge to the array can be made, or the whole array set aside by the court by reason of the misnomer of a juror or jurors; but on challenge a juror or jurors may be set aside by reason of a misnomer in his or their names; but such challenge can only be made before the jury is impaneled and sworn, and no indictment can be quashed or verdict set aside for any such irregularity or misnomer if the jurors who formed the same possessed the requisite qualifications to act as jurors.[2] Where a venire contains a name with merely a mistake in the initials of a person summoned as a juror, as "J. F. H.," instead of "J. C. H.,"and the juror appears, but is directed by the court to stand aside, to which no objection is made, and after all of the other names on the venire are called independently of the one who was served by a wrong name, and the defendant challenges the array on account of such misnomer, the same may be properly overruled.[3] Nor should an array be set aside because certain of the jurors summoned failed to attend.[4]

A more serious question arises where the jury is not selected or drawn by the proper persons authorized by law. A lawful jury cannot be formed otherwise than as provided by the statute,[5] and when any of the essential steps have been omitted, the proper method of reaching such defect is by a challenge to the array and to have the whole panel set aside. If the law provides that certain persons, such as jury commissioners, shall draw the jurors, and that the court shall appoint the commissioners, a jury drawn by another unauthorized person, as the sheriff, merely because the court has failed to appoint the jury commissioners, does not constitute a lawful jury.[6] A jury selected by unauthorized persons is not a valid jury, and the doctrine of waiver does not apply to a defect of this character.[7] It is competent under a challenge to the array to show the death or removal of a juror.[8] A challenge to the array is rightly tried by the court,[9] and should be made in writing in some States,[10] and must necessarily be made before challenges to the polls are

[1] Forsythe *v.* State, 6 O. 20.
[2] R. S., sec. 5175.
[3] McHugh *v.* State, 42 O. S. 154.
[4] Warden *v.* State, 24 O. S. 143.
[5] Elkins *v.* State, 1 Tex. App. 539.
[6] Elkins *v.* State, 1 Tex. App. 539.
[7] Hulse *v.* State, 35 O. S. 423–6.
[8] Jones *v.* State, 8 W. L. J. 508.
[9] Commonwealth *v.* Walsh, 124 Mass. 32.
[10] Ryder *v.* People, 38 Mich. 269; People *v.* Doe, 1 Mich. 453 (but not in Ohio).

made, otherwise it will be considered waived.[1] It cannot be made after the impaneling has begun.[2] It cannot be made until there is a full panel in the jury box.[3]

To entitle a party to a new trial by refusal of the court to sustain a challenge to the array, it has been held that prejudicial error must have intervened. This was held in a case where the evidence did not show one of the jury commissioners was a freeholder of the State. Such commissioner was considered and held to be a *de facto* officer, and his acts valid.[4]

Mere irregularities and defects, not of essence, in the preliminary proceedings of selecting, drawing and summoning a jury, while it affords grounds for a challenge to the array, is not available upon a motion to quash an indictment.[5]

Sec. 403. New jury may be summoned when array set aside.—In criminal procedure, when the whole array is set aside upon a challenge to the array, the court may, under section 7275, make out a special venire of twenty-four names upon his own motion, and give it to the clerk, and have such jurors summoned to try the case.[6]

Sec. 404. Causes of principal challenge.—The statute prescribes nine causes of principal challenge applicable to both civil and criminal cases.[7] The criminal code also prescribes eight grounds of challenges for causes applicable only to criminal cases,[8] and authorizes the same challenges in criminal prosecutions that are allowed to parties in civil cases. The challenges for cause may all be made before resorting to peremptory challenges,[9] though the court may require the peremptory challenges to be made, after challenges for cause are exhausted, to each juror as called.[10] All challenges for principal cause must precede the challenges to the favor.[11] These appear in the succeeding sections in the order named in the statute.

Sec. 405. Same, continued—Conviction of crime.—If a juror has been convicted of a crime, which, by law, renders him disqualified to serve on a jury, he may be challenged for cause.[12]

Sec. 406. Same, continued—Interest in cause.—The second ground of principal challenge is when a person called as a juror

[1] State *v.* Davis, 14 Neb. 439; State *v.* Bryan, 40 Ia. 379.
[2] Ickes *v.* State, 16 O. C. C. 31.
[3] Thompson on Trials, sec. 91.
[4] Ickes *v.* State, 16 O. C. C. 31.
[5] Blaney *v.* State, 17 O. C. C. 486.
[6] Jones *v.* State, 14 O. C. C. 35; s. c. 7 O. C. Dec. 305.
[7] R. S., secs. 5176, 7278.
[8] R. S., sec. 7278.
[9] Hooker *v.* State, 4 O. 348.
[10] Schufflin *v.* State, 20 O. S. 233.
[11] Thompson on Trials, sec. 91, p. 87, n. 8.
[12] R. S., secs. 5176, 5189*f*.

has an interest in the cause.[1] This would embrace a direct or contingent interest in the suit for which he is called to serve as a juror, or an interest in a similar suit or one depending upon the result of the one in which he is called.[2] Citizens of a county or municipality are not disqualified by reason of interest in a cause to which the county or municipality is a party.[3] The rule was the reverse at common law.[4] A stockholder in a corporation which is a party to an action is sufficient cause for challenge.[5]

Sec. 407. Same, continued—Action pending between parties.—If the venire-man has a suit pending between himself and either party to the cause in which he is summoned, he may be challenged for cause.[6] But this statute is not to apply to a juror who has an action pending between him and the party which has already been ended.[7]

Sec. 408. Same, continued—Prior service.—If the person summoned has formerly been a juror in the same cause, he may be challenged for cause.[8] A verdict will not be set aside because of the fact that a party was also on the panel who tried the case before in another court, if the party by ordinary diligence might have ascertained this fact.[9] Even though a juror has been a member of the grand jury which found the indictment, although unknown to the party, will not necessarily entitle him to a new trial.[10]

Sec. 409. Same, continued—Business relations.—If the venire-man is the employer, employe,[11] counselor, agent, steward, or attorney of either party, he is disqualified and may be challenged for cause.[12] An employe, however, who has not been in the employ of the party to the suit for a year, has been considered not disqualified.[13] Where a juror manifests no disposition to conceal the relations which have existed between him and a party to a suit, but makes an apparently frank and open statement, something more should be found to evidence his unfitness to fairly try the case than the fact that he had been occasionally employed by one of the parties to temporarily work for one of the parties.[14] The mere fact that a juror has been temporarily

[1] R. S., sec. 5176.
[2] Davis *v.* Allen, 11 Pick. 466.
[3] Clermont County *v.* Lytle, 3 O. 289.
[4] Abbott's Trial Brief, 16.
[5] Purple *v.* Horton, 13 Wend. 9, 23.
[6] R. S., sec. 5176.
[7] State *v.* Ankrim, Tapp. (80) 112.
[8] R. S., sec. 5176.
[9] Hayward *v.* Calhoun, 2 O. S. 164.
[10] Beck *v.* State, 20 O. S. 228.
[11] Railroad Co. *v.* Mitchell, 63 Ga. 173.
[12] R. S., sec. 5176.
[13] Railroad Co. *v.* Brinker, 3 S. W. Rep. 99.
[14] Thompson *v.* R. R. Co., 11 W. L. B. 211.

employed by one of the parties at different times does not of necessity disqualify him from sitting, but may, within the discretion of the court, be allowed to sit in the case.[1]

Sec. 410. Same, continued—Subpœnaed as a witness.—That the venire-man has been subpœnaed in good faith in the cause as a witness is a ground of principal challenge.[2]

Sec. 411. Same, continued—Relationship.—A juror may be challenged for cause if he is akin by consanguinity or affinity within the fourth degree to either party or his attorney.[3] The mode of computing the degrees of kindred adopted in this country is that of the civil law. Begin with the juror and ascend to the common ancestor; then descend to the other person in question, recognizing a degree for each person in both the ascending and descending lines. And if a juror is not related by consanguinity or affinity within the fourth degree to either of the parties in the suit, he is competent to sit as a juror therein.[4] The relationship must be to either of the parties to the suit, and not to a brother or sister of one of the parties.[5]

Sec. 412. Same, continued—Action pending between parties.—A juror who is a party to another action then pending in any court in which any attorney in the cause then on trial is an attorney, either for or against him, is disqualified.[6]

Sec. 413. Same, continued—Previous service as talesman.—A juror may be challenged when not being a regular juror of the term, he has served once already as a talesman in the trial of any cause, in any court of record in the county within the preceding twelve months.[7] A juror within the meaning of this section is disqualified who is called as a talesman, is sworn and hears all the evidence, although the case is compromised and the jury is discharged without a verdict.[8] Under the changes in the statutes with reference to the selection of jurors, we do not have talesmen, although the statute still authorizes it.

Sec. 414. Challenges to the favor—Suspicion of prejudice or partiality.—Challenges to the favor according to the old law governing challenges, is the second class of challenges for cause, and embraces numerous grounds of challenge not falling strictly

[1] Thompson *v.* Railway Co., 11 W. L. B. 211.
[2] R. S., sec. 5176.
[3] R. S., sec. 5176.
[4] Kahn *v.* Reed, 8 O. C. C. 345. See Thompson on Trials, sec. 61.
[5] Chase *v.* Jennings, 38 Me. 44; Johnson *v.* Richardson, 52 Tex. 481.
[6] R. S., sec. 5176.
[7] R. S., sec. 5176.
[8] Farnulener *v.* Anderson, 15 O. S. 473

within the class called principal challenges. Principal challenges included all causes of challenge which were such as matter of law. But this old distinction between principal challenges and challenges to the favor is no longer observed.[1] As challenges to the favor formerly included everything that might give rise to a suspicion of prejudice or partiality arising out of the relations to parties, so it is under the code made a specific ground of challenge, so that any petit juror may be challenged on suspicion of prejudice against, or partiality for, either party to a cause;[2] and it is therefore a challenge for cause. If in a legal sense, a suspicion of prejudice or partiality is shown to exist, a challenge for a cause should be sustained. But the validity of such a challenge is committed to the sound discretion of the court, so that there can be no error in overruling a challenge upon this ground unless there has been an abuse of discretion.[3] A prejudice against the business of one of the parties has been considered to come within this ground.[4] And so with a prejudice against a class of actions, as slander suits,[5] or personal injury cases,[6] or against crime,[7] or against the nationality of one of the parties.[8] But it is said that notwithstanding the feeling of prejudice if the juror says that he can lay aside this feeling and render a fair verdict upon the evidence, he may be allowed to remain as a juror.[9] As already stated, it rests within the discretion of the court.

The fact that some matter involved may have been prejudged by the juror is immaterial if upon the whole issue the court find that he may be capable of delivering an impartial verdict upon the evidence.[10] What constitutes a prejudice or partiality to sufficiently warrant a court in sustaining a challenge upon that ground depends upon such a variety of circumstances, that each case must depend upon its own facts, and hence there is difficulty in framing any general rule for future guidance. The court must use its best judgment in each case, but where the prejudice or partiality is positive and fixed it would be error not to exclude him.[11] Intimate acquaintance between a proposed juror and a

[1] Thompson on Trials, sec. 52.

[2] R. S., sec. 5177; Whittaker's Civ. Code, p. 171.

[3] Dew *v.* McDivitt, 31 O. S. 139; Serviss *v.* Stockstill, 30 O. S. 418.

[4] Robinson *v.* Randall, 82 Ill. 521. Prejudice against a liquor dealer. Chandler *v.* Ruebett, 83 Ind. 139. The contrary is held by many authorities. See Elliott's Gen. Pr., sec. 521.

[5] Young *v.* Bridges, 34 La. Ann. 333.

[6] McCarthy *v.* Railway Co., 4 S. W. 516; 92 Mo. 536.

[7] State *v.* Burns, 85 Mo. 47.

[8] Balbo *v.* People, 19 Hun, 424; 80 N. Y. 484.

[9] Thompson on Trials, sec. 73.

[10] Dew *v.* McDivitt, 31 O. S. 139. A juror does not render himself incompetent if he states that notwithstanding his opinions, he is capable of rendering an impartial verdict upon the evidence, and the court so decides. Palmer *v.* State, 42 O. S. 596.

[11] Elliott's Gen. Pr., sec. 521; Omaha *v.* Cane, 15 Neb. 657; People *v.* McGonegal, 136 N. Y. 62; Lawlor *v.* Linforth, 72 Cal. 205; People *v.* Carpenter, 102 N. Y. 238.

party may give rise to a suspicion of prejudice or favor, and be ground for a challenge.[1]

Sec. 415. Same, continued—Want of knowledge of English language.—Want of competent knowledge of the English language on the part of any one summoned as a juror disqualifies him under the statute from acting as such,[2] although it has been held that this power was invested in the court independently of statute.[3] This objection, however, like others, will be waived unless inquiry is made; mere ignorance by the party is not sufficient.[4] The fact that a juror has served without objection is not ground for new trial.[5]

Sec. 416. Same, continued—For any cause rendering juror unsuitable.—The code provides that any other cause that may render a person at the time an unsuitable juror, may be challenged, the validity of which must be determined by the court.[6] The validity of challenges under this head not falling under any of the positive grounds specified by statute, but coming more particularly under the clause "any other cause," must depend upon the peculiar circumstances of the case, and rest within the sound discretion of the court. A juror who answers upon his *voir dire* that he will not render a verdict upon circumstantial evidence alone, but that he will require direct evidence, may properly be rejected from the panel.[7] The count may, *sua sponte*, excuse an unsuitable juror, such as for defective hearing.[8] Deafness, if clearly shown by evidence, would disqualify a juror.[9] A juror is not disqualified because he has an opinion favorable to the credibility of a witness who is to testify in the case.[10]

Sec. 417. Peremptory challenges in civil cases.—Each party to a civil case has the right under the statute to peremptorily challenge two jurors.[11] Party means side, and it matters not, therefore, how many defendants there may be, they together can exercise only two challenges.[12] Even though each defendant files a separate answer and be represented by different counsel, they are but one party, and entitled to but two peremptory challenges.[13]

Sec. 418. Peremptory challenges in capital cases by defendant.—In the trial of a person for a capital offense the defendant is

[1] Moore *v.* Cass, 10 Kan. 288.
[2] R. S., sec. 5177.
[3] Sutton *v.* Fox, 55 Wis. 531; 42 Am. Rep. 744.
[4] Dokes *v.* Soards, 9 W. L. B. 76.
[5] *Id.*
[6] R. S., sec. 5177.
[7] Blair *v.* State, 5 O. C. C. 496; 3 O. C. D. 242.
[8] Ickes *v.* State, 16 O. C. C. 31.
[9] Alm *v.* Andrews Brothers Co., 9 C. C. 591.
[10] State *v.* Kurrley, 3 O. N. P. 1.
[11] R. S., sec. 5177.
[12] Moores *v.* Bricklayers Union, 23 W. L. B. 48.
[13] Gram *v.* Sampson, 4 O. C. C. 490; s. c. 2 O. C. D. 666.

entitled under the statute to challenge sixteen jurors peremptorily.[1] And where two or more persons are put on trial at the same time, each is entitled to exercise his peremptory challenges independently.[2] At common law the party had the right to hold his peremptory challenge in reserve up to the time of swearing the jury.[3] And in a very early case in this State this right was recognized upon the theory that the mere challenge for cause might provoke resentment or prejudice, and for this reason it was considered that the right of the peremptory challenge ought to be left open for the latest possible period.[4] But Mr. Thompson, in his work on Trials, says that in many American jurisdictions it is held that all right of challenge is at an end as soon as the juror has taken his seat.[5] But the practice in Ohio has long been that both parties must make their peremptory challenges after having first exhausted their challenges for cause, to each juror as called. And it has been held that the means and manner of administering the right of exercising the right of peremptory challenge is wholly within the discretion of the court, and that it is not error to require the exercise of the right to the peremptory challenge immediately after the exercise of the right of challenge for cause.[6] It has been held in Ohio that where the defendant has challenged one of a special venire and passed his second challenge, and the special venire is exhausted and a new juryman called, it is error to refuse a second peremptory challenge.[7]

Sec. 419. Peremptory challenges in criminal cases other than capital.—In cases other than capital, a defendant is strictly limited to two peremptory challenges, in this regard enjoying no higher privilege than does the State. And where a defendant is indicted for murder in the first degree, and a jury is summoned, if the capital charge is nollied, in impaneling a jury to try him for murder in the second degree, from the thirty-six in attendance he is still restricted to two peremptory challenges.[8] The question as to the order in which challenges for cause and peremptory may be made, was considered by the supreme court in an early case, other than capital, in which it was stated that the policy of the law was to afford a defendant the opportunity, after having unsuccessfully challenged for cause, whereby he may have provoked resentment on the part of such juror, to reserve the right of peremptory challenge until the latest possible moment.[9] The rule is now well settled that when a juror has been

[1] R. S., sec. 7272.
[2] R. S., sec. 7280; Bixbie *v.* State, 6 O. 86.
[3] Thompson on Trials, sec. 92.
[4] Hooker *v.* State, 4 O. 348.
[5] Thompson on Trials, sec. 92.
[6] Schufflin *v.* State, 20 O. S. 233.
[7] Koch *v.* State, 32 O. S. 352.
[8] Goins *v.* State, 46 O. S. 457.
[9] Hooker *v.* State, 4 O. 348.

challenged for cause, which is overruled by the court, the defendant must immediately make use of his peremptory challenge, or, in other words, he must decide at once whether he will exercise his right of peremptory challenge to each juror as called, if he cannot successfully challenge him for cause. He cannot reserve his right until twelve persons not challenged for cause are in the box.[1]

Sec. 420. Peremptory challenge by State.—Under the statute, in both capital and lesser crimes, two of the panel are subject to peremptory challenge by the prosecuting attorney on behalf of the State.[2] The right of the State, in this particular, is not enlarged even in capital cases, although that of the defendant is;[3] nor, where several defendants, who have been jointly indicted, are tried at the same time, each being allowed the statutory number of challenges in such cases.[4]

Sec. 421. Challenges in criminal cases for cause.—The same challenges are allowed in all criminal prosecutions that are allowed to parties in civil causes.[5] In addition to those which are allowed in civil cases, the criminal code allows a defendant to make challenges for eight different causes. All challenges for cause are tried by the court, on the oath of the person challenged, or on the evidence, and must be made before the jury is sworn.[6] There is no prejudicial error in overruling a challenge for cause, when the juror is set aside peremptorily by the defendant without exhausting his peremptory challenges, and the verdict will not be set aside for that reason.[7] But it would, as before shown, be otherwise if the challenge for cause be erroneously overruled, and the defendant was compelled to exhaust his peremptory challenge in order to get rid of the objectionable juror. The defendant and the prosecuting attorney may challenge any of the panel for cause.[8]

Sec. 422. Same, continued—Member of grand jury which found indictment.—A person who served as a member of the grand jury which found the indictment cannot serve as a juror.[9] But an objection upon this ground must, like all others, be made before the jury is sworn. And where no inquiry is made on the subject until after the verdict, the existence of such cause

[1] Thurman *v.* State, 4 O. C. C. 141; 2 O. C. D. 466.
[2] R. S., sec. 7274, 7277.
[3] Fouts *v.* State, 8 O. S. 98.
[4] Mahan *v.* State, 10 O. 233.
[5] R. S., sec. 7278, ninth clause.
[6] R. S., sec. 7279.
[7] Mimms *v.* State, 16 O. S. 221; Erwin *v.* State, 29 O. S. 186; Griffin *v.* State, 18 O. S. 438.
[8] R. S., sec. 7277.
[9] R. S., sec. 7278.

for challenge, though previously unknown to the defendant and counsel, will not necessarily entitle him to a new trial.[1]

Sec. 423. Same, continued—Opinion as to guilt or innocence of the accused—Examination voir dire.—In criminal procedure, it is provided that if a juror has formed or expressed an opinion as to the guilt or innocence of the accused, it is a ground for challenge for cause. But it is further provided that "the court shall thereupon proceed to examine such juror on oath as to the grounds of such opinion, and if such juror shall say that he believes he can render an impartial verdict notwithstanding such opinions, and if the court is satisfied that such juror will render an impartial verdict on the evidence, may admit him as competent to serve."[2] The language of the statute is that the court shall thereupon proceed to examine the juror, etc.; that does not mean that the court shall examine the juror himself prior to the ascertainment of the fact that the juror has expressed an opinion. It contemplates that when counsel in the *voir dire* examination discloses the fact that the juror has formed or expressed an opinion, that that being a ground for challenge, that then it is the duty of the court to take hold of the matter and make such further examination into the particular matter of the opinion as he may desire, to see whether or not it is of such a nature or character as will under the statute disqualify him. This further examination may be conducted by counsel with the consent of the court, and where the examination is so conducted by counsel in the hearing and with the sanction of the court, it is a substantial compliance with the statute. It is only necessary to substantially ask the questions mentioned in the statute.[3] The manifest purpose of the statute in requiring this examination by the court, is to ascertain the grounds of opinion, how he reached his conclusion; whether it was on mere rumor and hearsay, and not founded on any substantial basis, or in some other way, and in such a manner as would render it difficult for any man, however honest he might be, to lay aside the opinion formed. A limitation of the examination of the juror by counsel for defendant to ascertain the weight of his opinion, is improper.[4]

The true spirit and meaning of the statute is, that, notwithstanding an opinion formed or expressed by a juror, if he believes himself to be impartial and able to render a verdict according to the evidence, the court being satisfied of his impartiality, he may be

[1] Beck *v.* State, 20 O. S. 228.
[2] R. S., sec. 7278.
[3] McGuire *v.* State, 3 O. C. C. 551; 2 O. C. D. 318.
[4] Limerick *v.* State, 14 O. C. C. 207; 7 Oh. (Cir.) Dec. 664.

admitted as a competent juror.[1] A distinction is made by the court between an opinion formed from reading newspaper reports, and an opinion formed from reading reports of the evidence, as also opinions formed from communications with witnesses.[2] The matter is left very largely with the discretion of the court.

The record ought to show that the court is satisfied, notwithstanding the opinion, that the juror is impartial; but in the absence of such finding, it will be presumed by the reviewing court that such a finding was made by the trial court.[3]

Sec. 424. Same, continued—Opinion formed from reading newspaper—Hearsay, &c.—Where a person called as a juror in a criminal cause is challenged on the ground that he has formed or expressed an opinion as to the guilt or innocence of the accused, and it appears that his opinion is founded upon reading newspaper statements, communications, comments or reports, or rumor or hearsay, and not upon conversations with witnesses of the transactions, or reading reports of their testimony, or hearing them testify, he is not disqualified if he will state under oath that he feels able, notwithstanding such opinion, to render an impartial verdict upon the law and the evidence, and the court is satisfied that the juror is impartial and will render an impartial verdict in the case.[4] Where a juror states that his reading a newspaper account of the transaction has created a bias or prejudice against the defendant which he would have until it was removed; that he would enter upon the trial with that prejudice, and that it would require evidence to remove it, but would try to lay aside all former opinions, which he believed he could do, and that he would render an impartial verdict on the law and evidence, may be accepted if the court is satisfied that he will render an impartial verdict.[5] An extreme case is found where the court exercised its discretion, and it was not held to be an abuse, was where a juror had entertained an opinion, formed not only from reading an account of the case in a newspaper, but had received from the father of the person killed, a narrative of the circumstances of the homicide.[6]

Sec. 425. Opinion formed from hearing circumstances from one claiming knowledge.—A juror who states on his examination that

[1] Palmer *v.* State, 42 O. S. 605; Jones *v.* State, 14 O. C. C. 35; Goins *v.* State, 46 O. S. 457. The court may, if satisfied from the statements of the proposed juror, that he can put his opinion or prejudice aside and render an impartial verdict on the evidence, admit such juror as competent. Jones *v.* State, 14 O. C. C. 35.

[2] Jones *v.* State, 14 O. C. C. 35.

[3] Goins *v.* State, 46 O. S. 457.

[4] Frazier *v.* State, 23 O. S. 551; Cooper *v.* State, 16 O. S. 328; McHugh *v.* State, 38 O. S 153; Doll *v.* State, 45 O. S. 445; Jones *v.* State, 14 O. C. C. 35; Blair *v.* State, 5 O. C. C. 496.

[5] McCarthy *v.* State, 5 O. C. C. 628; s. c. 3 O. C. D. 306.

[6] Goins *v.* State, 46 O. S. 457, 461.

he has formed an opinion on a matter affecting the guilt of the defendant, from having heard the circumstances of the crime related by one who claimed to know them, may nevertheless be competent to sit as a juror if he says on oath that he believes he can render an impartial verdict in the case, and the court is satisfied he can do so.[1] The fact that the court admits such a person as a juror, is a sufficient finding that it was satisfied he could render an impartial verdict.[2]

Sec. 426. Opinion formed by reading reports of testimony.—A person who bases his opinion upon reading reports purporting to be a report of the testimony of witnesses of the transaction, has been held to be disqualified from sitting as a juror.[3]

Sec. 427. Opinions requiring evidence to remove.—A juror who has formed an opinion which he thinks it would require evidence to remove is, according to numerous authorities, disqualified.[4] And it is considered as very unsafe and unwise to trust such a juror in the hope that he may change his mind. Where a juror states, therefore, that he has formed an opinion which he would take into the jury box, and that it would take strong evidence to change it, he is certainly disqualified even though he says, upon being pressed, that he felt able to render an impartial verdict upon the evidence.[5] But one who has formed an opinion from reading newspaper reports, and not from reading or hearing the testimony of witnesses, or conversations with them, though he thinks it would require evidence to remove, is not necessarily incompetent. If he testifies that he believes he would, if selected, render an impartial verdict upon the evidence, and the court is of the same opinion, he is a lawful juror.[6]

Sec. 428. Opinion formed from reading report of former trial.—The opinion has been entertained in some jurisdictions that an opinion formed from reading the reports of the testimony in a former trial may or may not disqualify a juror.[7] But in Ohio it is held that a challenge upon such ground should be sustained even though upon further examination the juror should state that he believes himself capable of rendering an impartial verdict.[8]

[1] Goins *v.* State, 46 O. S. 457.
[2] *Id.*
[3] Frazier *v.* State, 23 O. S. 551; Brown *v.* State, 70 Ind. 576.
[4] Thompson on Trials, sec. 80, and cases cited.
[5] Palmer *v.* State, 42 O. S. 596.
[6] McHugh *v.* State, 42 O. S. 154; Blair *v.* State, 5 O. C. C. 496; Cooper *v.* State, 16 O. S. 328; Frazier *v.* State, 23 O. S. 551; Erwin *v.* State, 29 O. S. 186; McHugh *v.* State, 38 O. S. 153.
[7] Thompson on Trials, sec. 81.
[8] Erwin *v.* State, 29 O. S. 189.

Sec. 429. Hypothetical opinion.—The expression by a juror, before the trial, of a hypothetical opinion as to the guilt or innocence of the accused dependent upon a particular state of facts as to the existence of which no opinion is given, does not constitute a sufficient ground for a challenge.[1]

Sec. 430. Opinions against capital punishment.—By statute in indictments for an offense, the punishment whereof is capital, if the opinions of the juror are such as to preclude him from finding the accused guilty of an offense punishable with death, he is thereby disqualified.[2] When a juror states that he is on principle opposed to capital punishment, and that his opinion will influence his decision against the law and the evidence, he may be challenged for cause.[3] It has been held that the acceptance of a juror whose scruples against capital punishment extend only to cases depending on circumstantial evidence is not error, where the conviction was on direct evidence.[4] It has been considered that under a statute such as we have in Ohio, where the punishment may be death or imprisonment for life within the discretion of the jury, conscientious scruples against capital punishment do not disqualify a juror.[5]

Sec. 431. Relationship.—In criminal cases a juror who is related within the fifth degree to the person alleged to be injured, or attempted to be injured by the offense charged, or to the person on whose complaint the prosecution was instituted, or to the defendant, is disqualified.[6]

Sec. 432. Service on petit jury in same case.—A juror who has served on a petit jury which was drawn in the same case against the same defendant, which jury was discharged after hearing the evidence, or rendered a verdict which was set aside is disqualified.[7]

Sec. 433. Service on civil jury against defendant.—A juror who has served as a juror in a civil case brought against the defendant for the same act is disqualified.[8]

Sec. 434. Subpœnaed as a witness.—A juror who has been in good faith subpœnaed as a witness in the case is incompetent.[9]

Sec. 435. Habitual drunkard.—A juror who is an habitual drunkard is disqualified.[10]

[1] Loeffner *v.* State, 10 O. S. 598.
[2] R. S., sec. 7278.
[3] Martin *v.* State, 16 O. 364.
[4] Nairn *v.* State, 45 S. W. 703.
[5] State *v.* Lee, 91 Ia. 499.
[6] R. S., sec. 7278.
[7] R. S., sec. 7278.
[8] R. S., sec. 7278.
[9] R. S., sec. 7278.
[10] R. S., sec. 7278.

Sec. 436. Order of challenge.—The order in which parties shall exercise their right of challenge is confided wholly to the discretion of the court; consequently there can be no complaint by either side unless there has been a clear abuse of that discretion.[1]

In exercising the right of challenging for cause the plaintiff would make the first challenge, alternating with the defendant until the parties pass for cause; and the same rule applies to peremptory challenges. Both parties must make their peremptory challenges to each juror as called after having exhausted their challenges for cause.

Sec. 437. Challenges, how tried.—All challenges to the array and for cause, are tried upon a *voir dire* examination to the court,[2] upon the testimony of the proposed juror, and perhaps other testimony. To lay the foundation for error the examination should be taken and become part of the bill of exceptions.

Sec. 438. Erroneous overruling of a challenge.—The right of a defendant to the free exercise of his right to challenge a juror for either cause or peremptorily, should be guarded and protected by the court. If he is deprived of a proper exercise of that right by an erroneous overruling of a challenge for cause, error intervenes of which he can complain upon a motion for a new trial and have corrected in a reviewing court. If, however, an erroneous overruling of a challenge of a juror for cause does not infringe his right of challenge in any respect, he cannot complain even though the court did err. For example, if a challenge for cause be erroneously refused, but before he has exhausted his right to peremptorily challenge, such juror is peremptorily challenged, an acceptable jury is impaneled, he is not harmed, and there is no error justifying a reversal of a judgment.[3] So where a challenge for cause is improperly refused by the court, and the objectionable juror is excused upon a peremptory challenge by the State, the defendant cannot complain of the error.[4] But if after a challenge for cause has been erroneously refused by the court, the defendant is compelled to peremptorily challenge the juror and the defendant exhausts his right to peremptorily challenge before an acceptable jury is obtained, he is then deprived of the exercise of one peremptory challenge, and there is material prejudicial error for which a judgment should be reversed.[5]

[1] Schufflin *v.* State, 20 O. S. 233; Commonwealth *v.* Piper, 120 Mass. 185.

[2] R. S., secs. 5176, 5177.

[3] Erwin *v.* State, 29 O. S. 186; Mimms *v.* State, 16 O. S. 221; Thompson on Trials, sec. 115.

[4] Griffin *v.* State, 18 O. S. 438.

[5] Hartnett *v.* State, 42 O. S. 568; Brown *v.* State, 70 Ind. 576.

Sec. 439. Swearing the jury.—When the parties have fully exercised their right of challenge, and the panel is complete, the last act in impaneling the jury, is administering the oath to them. The criminal code provides: When all challenges have been made, the following oath shall be administered: "You shall well and truly try, and true deliverance make between the State of Ohio and the prisoner at the bar (giving his name): so help you God." There is no special form of oath prescribed for civil cases, unless it be in the trial of the right of property, where they are sworn to try and determine the right of the claimant to the property in controversy, and a true verdict to give according to the evidence.[1] In criminal cases a juror may be allowed to make affirmation; and the words, "this you do as you shall answer under the pains and penalties of perjury," shall be substituted instead of the words, "so help you God."[2]

The statute contemplates, and such is the practice in both civil and criminal cases, that the jury shall be sworn only when the panel is complete. The practice in different jurisdictions in this matter is varied; in some cases it is held that each juror may be sworn as accepted. The jury should not, of course, in either criminal or civil cases, be sworn until the case is called for trial.[3]

In Ohio the form in criminal cases, we have seen, has been prescribed, and it should be followed, and not in any wise be confused with that used in civil cases.

Where the record in a case shows that "the jury were sworn to well and truly try and true deliverance make, between the State of Ohio and the prisoner at the bar," it will be presumed that the statutory form was observed in administering the oath.[4] If it appears from the record that the jury was duly sworn according to the statute, except that the record does not contain the invocation, "so help you God," it is an immaterial and non-prejudicial error;[5] and so when the words, "according to the law and the evidence" are omitted.[6] An objection that the jury was not properly sworn cannot be considered on error, unless the bill of exceptions shows the form of the oath that was actually administered.[7]

[1] R. S., sec. 5445.
[2] R. S., sec. 7282.
[3] Thompson on Trials, sec. 105.
[4] Wareham *v.* State, 25 O. S. 601.
[5] Kerr *v.* State, 36 O. S. 614.
[6] Boose *v.* State, 10 O. S. 575.
[7] Bartlett *v.* State, 28 O. S. 669.

CHAPTER XXII.

WHAT SHOULD BE SUBMITTED TO JURY—LAW AND FACT.

SEC.
440. Province of jury.
441. Commenting on evidence.
442. Confessions.
443. Contracts.
444. Construction of writings.
445. Contributory negligence.
446. Foreign laws.
447. Fraud.
448. Identity.
449. Negligence.
450. Payment.
451. Probable cause.
452. Reasonableness or unreasonableness.
453. Slander or libel.
454. Total loss under insurance policy.

SEC. 440. Province of jury.—It is the duty of the jury to receive the law as it is given them by the court; it is the exclusive province of the court to determine what the law is; and the jury have no right to hold the law to be otherwise in any particular than as given them by the court.

It is, of course, to be understood, not the arbitrary power, but the right of the jury in the conscientious and proper discharge of their duty. It is made the peculiar province of the jury to decide the questions of fact, under the instructions of the court, as to the law of the case. The judges of courts are selected with a view to their knowledge of the law, and jurors with a view to their practical sense on matters of fact. If the court err in the determination of matters of law there is a remedy by error. It is the duty of the jury, therefore, to regard the law as determined by the court, and this duty is required by the obligations of the juror's oath. And in the proper and conscientious discharge of their duty, a jury cannot, or in other words, has no right to determine that the court erred in its instructions as to the law, and therefore to disregard the law as laid down to them by the court.[1]

No juror can rightfully disregard the law as declared in the instructions of the court to the jury.[2] Court and jury have separate, distinct and independent functions to perform, which cannot be invaded by either. It is important that the court do not transgress the limits of its powers by passing upon questions which should be submitted to the jury. To do so would result in error.[3] There are many matters which the court is called upon to decide before its charge to the jury, when it may

[1] Montgomery *v.* State, 11 O. S. 424; Robbins *v.* State, 8 O. S. 131, 166.

[2] Robbins *v.* State, *supra.*

[3] Fort Wayne *v.* Coombs, 107 Ind. 75.

be necessary to decide questions of fact, which may be termed preliminary questions of fact to the main fact to be established. The court must decide all questions of the admissibility of evidence, and in doing so the jury may be called upon to decide whether an instrument claimed to be lost was ever in existence before its contents can be proved,[1] or the execution of a deed when its validity is questioned, or whether a witness is qualified as an expert,[2] or whether a dying declaration may properly be admitted, or a confession be voluntary,[3] and many others of like character. The court may also be called upon to decide whether or not there is any evidence to be submitted to the jury.[4] But with the tendency or weight of the evidence the court has nothing to do,[5] nor should the court either directly or indirectly force upon the jury his view of any fact or inference of fact.[6]

This chapter will discuss what should and what should not be submitted to the court, or questions of law and of fact, the purpose being not to attempt to give a complete list of the numerous questions that are for the court or jury, but only some of the most conspicuous ones.

Sec. 441. Commenting on evidence.—The rule in this State as to this matter is expressed by the court in Morgan *v.* State,[7] and is discussed elsewhere.

According to the English practice, considerable latitude was allowed the judge in this matter; he could comment upon and even advise the jury, if he finally committed the facts to the jury. It is just the reverse in this country. The lines are carefully drawn between court and jury. But this question is reserved for discussion in another chapter.[8]

Sec. 442. Confessions.—Confessions of guilt in criminal prosecutions when free and voluntary are regarded as satisfactory proof of guilt, but are received with great caution, and are not admissible as evidence at all unless it appears to be purely voluntary. The question in every case whether or not a confession be induced by hope, fear, representations or threats making it involuntary, or is voluntary, is for the court to determine as matter of law, and if involuntarily made it cannot be received.[9] The burden of proving that it was involuntary is upon the defendant, and he may offer evidence to the judge to show that

[1] Blackburn *v.* Blackburn, 8 Ohio, 81.
[2] Commonwealth *v.* Williams, 105 Mass. 62.
[3] See sec. 442, *post.*
[4] Clough *v.* State, 7 Neb. 320.
[5] Mead *v.* McGraw, 19 O. S. 55.
[6] Eilert *v.* Railroad Co., 48 Wis. 606.
[7] 48 O. S. 371.
[8] See sec. 660, *post.*
[9] Spears *v.* State, 2 O. S. 584; Jackson *v.* State, 39 O. S. 37; Fouts *v.* State, 8 O. S. 98, 108.

the confession was procured by threats or inducements.[1] In some jurisdictions, where the evidence is conflicting, and the question difficult of solution, the practice has been to submit it to the jury, with instructions to disregard the confession if found to have been involuntarily made, though this practice was not followed long.[2] A preliminary examination is entered into before the court, who rejects or admits the confession according as it finds the circumstances. If the court finds that the confession was not made under duress, compulsion or through trick or artifice, it should be allowed to go to the jury. If made under duress or in any manner so that it cannot properly be considered involuntary, then it should be withheld from the jury. The test of its incompetency appears to be the existence of reasonable ground for presuming, under the circumstances, that the disclosure was made under the influence of some promise or threat of a temporal nature.[3]

Sec. 443. Contracts.—The construction of contracts or written instruments is committed to the determination of the court as matter of law, and it is therefore erroneous to submit the question to the jury.[4] But if there is a latent ambiguity which must be solved or explained by extrinsic unconceded facts, or parol evidence, from which different inferences may be drawn, then the question should be submitted to the jury as one of fact.[5] It "is the duty of the jury to take the construction from the court, either absolutely, if there be no words to be construed, as words of art, or phrases used in commerce, and no surrounding circumstances are to be ascertained; or conditionally, when those words or circumstances are necessarily referred to them."[6] For example, questions arising upon the scope of authority of an agent under a written contract admitted in evidence,[7] or as to whether or not there is a partnership as shown by a contract,[8] or whether the word "month" in a contract is meant a calendar or lunar month,[9] or where the question of the power of disposition appears upon the face of a mortgage, or is fairly to be inferred from its provisions,[10] or the effect of a conveyance,[11] are questions of law for the court.

[1] Rufer *v.* State, 25 O. S. 464.

[2] Greenleaf's Ev., (15th Ed.) pp. 296, 297, note *a*.

[3] Fouts *v.* State, 8 Oh. 108–9.

[4] Monett *v.* Monett, 46 O. S. 30; Jones *v.* Swearingen, 19 S. E. Rep. 947; 42 S. C. 58; Brady *v.* Cassidy, 104 N. Y. 147; Warner *v.* Thompson, 35 Kan. 27. The court must find not what the parties secretly intended, but what is the meaning of their words. 1 Greenl. Ev., (15th Ed.) secs. 277, 295.

[5] Mantz *v.* Maguire, 52 Mo. App. 136; Darling *v.* Dodge, 36 Me. 370; Reed *v.* Proprietors of Locks, 8 How. 274; Elliott's Gen. Pr., sec. 439.

[6] Monett *v.* Monett, *supra*, 37, quoting from Neilson *v.* Hofford, 8 M. & M. 806.

[7] Pollock *v.* Cohen, 32 O. S. 514.

[8] Insurance Co. *v.* Ross, 29 O. S. 431; Everett *v.* Chapman, 6 Conn. 347.

[9] 1 Greenl. Ev., p. 79*n*.

[10] Freeman *v.* Rawson, 5 O. S. 1.

[11] Holden *v.* Belmont, 32 O. S. 589.

When, on a trial for forgery, a variance is alleged between the name to the forged instrument and the name appearing in the indictment, if the variance is plain, such instrument ought not to be allowed to go in evidence; but if the forged name is uncertain, and susceptible of being read as agreeing with the name stated in the indictment, it is not error for the court to submit the question to the jury.[1] Where a construction of a contract is desired, the party should request it, as the failure to so construe it would not in such case be erroneous.[2]

Whether or not a contract to construct a building has been substantially performed is a question for the jury.[3]

Sec. 444. Construction of writings.—"It is no doubt true that the construction of written instruments is matter of law, and that when a written instrument is laid before jurymen they are bound to receive the interpretation of the effect of that instrument from the judge," was the rule long ago expressed by Lord Westbury.[4] If words have in particular places and trades a known meaning attached to them, it is for the jury to say what such meaning is;[5] their meaning varies according to the circumstances and the subject-matter where used.[6] But the court must determine what the usual or ordinary meaning is. It is often necessary to throw light upon the meaning of contracts that extrinsic facts relating thereto must be deduced, and then the court takes into consideration the combined effect of the facts and words, and determines the meaning.

Sec. 445. Contributory negligence.—In a proper case, the court may take from the jury the evidence offered by the plaintiff, or may submit the same to the jury with instructions to return a verdict for the defendant. Questions of contributory negligence on the part of the plaintiff and of negligence on the part of the defendant, must be considered and determined upon the same principles and by the same rules exactly. There is no presumption as against either party, and as a general rule the existence of negligence on either side is a question to be determined by the jury under proper instructions from the court. The expression is often seen that whether or not contributory negligence exists, is a mixed question of law and fact, which is a somewhat vague and unsatisfactory expression. It is a fact for the jury when there is testimony such as the law regards as competent

[1] Turpin *v.* State, 19 O. S. 540.

[2] Railroad Co. *v.* Iliff, 13 O. S. 235.

[3] Johnson *v.* Slaymaker, 18 O. C. C. 104.

[4] Lyle *v.* Richards, 1 L. R. H. L. 222, 241.

[5] Hutchinson *v.* Bowker, 5 M. & W. 535, 542.

[6] Allgood *v.* Blake, 8 L. R. Ex. 160.

to prove it, and it is then to be determined by them in accordance with the rules which the court may give to the jury for their guidance. That is about all there is in the question of mixed law and fact.

Where, however, all of the material facts in a case are undisputed or are found by the jury, and admit of no rational inference but that of negligence, or that of due care, it is no doubt the duty of the court to instruct the jury, as a matter of of law, whether or not there was any negligence.[1]

If the question of contributory negligence depends upon a variety of circumstances from which different minds may arrive at different conclusions, or where the evidence is disputed, the question must then be submitted to the jury, under proper instructions.[2] And the jury should be left free to consider all the testimony in the case.[3] The trial court should not invade the province of the jury, but if there is evidence which *tends* to prove negligence of one party or the other, it should be submitted to the jury to determine whether plaintiff was injured by his own fault or that of the defendant.[4]

If the negligence of the defendant be clearly established by the evidence, the case should not then be taken from the jury unless contributory negligence is *clearly* established and there can be no other inferences drawn.[5] The court may act with more safety when the matter is brought before it on a motion for a new trial, when the verdict may be set aside if not sustained by sufficient evidence.[6] But if the evidence is undisputed and shows such contributory negligence as will defeat recovery, it is then the duty of the court to declare the result of such testimony to the jury as matter of law.[7] For example, if the evidence shows beyond doubt that a plaintiff by exercising his senses could have both seen and heard an approaching train in time to have avoided the injury, then it is a question of law for the court.[8] Where the conclusion is inevitable that as matter of law no recovery may be had, there should be a non-suit.[9]

Sec. 446. Foreign laws—Construction.—Domestic laws being noticed judicially, questions relating thereto, such as existence, validity and interpretation, are for the determination by the

[1] Baltimore & Ohio R. R. Co. *v.* Stoltz, 18 O. C. C. 93; Railroad Co. *v.* Crawford, 24 O. S. 631.

[2] Railroad Co. *v.* Picksley, 24 O. S. 654; Snell *v.* Street Railway Co., 9 O. C. C. 348

[3] Robinson *v.* Gary, 28 O. S. 241.

[4] Stockstill *v.* Railroad Co., 24 O. S. 83; Kelley *v.* Howell, 41 O. S. 438; Wells *v.* Railroad Co., 9 O. C. C. 340.

[5] Weller *v.* Railroad Co., 120 Mo. 635; 23 S. W. Rep. 1061; 25 S. W. Rep. 532.

[6] Wells *v.* Railroad Co., 9 O. C. C. 340.

[7] Hudson *v.* Railway Co., 14 S. W. 15; 101 Mo. 13.

[8] Blount *v.* Railway Co., 61 Fed. Rep. 375.

[9] Gardner *v.* Railroad Co., 150 U. S. 349.

court as matter of law.[1] But as the existence of foreign laws, or laws of a sister State, cannot be judicially noticed, but must be proven as other facts, it is an issue of fact for the jury;[2] and when there has been a particular or peculiar construction placed upon them by such State, when drawn in question in the courts of another State, evidence showing what that construction is should be introduced.[3] This may be done by having an attorney in such State testify to the construction placed on it by the courts of such other State. The existence, construction or legal effect of foreign laws being matter of law, when they have been authoritatively construed, cannot be inquired into.[4]

Sec. 447. Fraud.—Whether or not a person intended to commit fraud must be decided by the jury as a question of fact, unless it be self-evident, when it becomes a question of law for the court.[5] Hence it would not be proper for the court to charge the jury that if they find certain facts to be true the defendant would be guilty of fraud, as it would be invading the province of the jury.[6] Fraud may be presumed from admitted circumstances, as where the vendor in a bill of sale or chattel mortgage retains possession, there is in such case a *prima facie* case of fraud, unless there be a stipulation that he is to retain possession and pay over the proceeds of the sale to the mortgagee.[7] And in such case, where the court may presume fraud, the same may be passed on alone by the court.[8]

If the fraudulent intention is not apparent on the face of the mortgage as disclosed by the instrument, and it becomes necessary to introduce evidence to establish the same, it must be determined by the jury.[9] While knowledge of one who purchases property conveyed in fraud of creditors may be very cogent evidence of fraud, yet the court must submit that question to the jury, and should not unduly comment on the fact.[10] The question of the good faith of a party to a transaction assailed as fraudulent, when the facts are disputed, is always for the jury to decide as a matter of fact.[11]

[1] Sutherland on Stat. Const., sec. 181; Large *v.* Orvis, 20 Wis. 696; Gibson *v.* Ins. Co., 144 Mass. 81.

[2] Ingraham *v.* Hart, 11 Ohio, 255; James *v.* Railroad Co., 2 Disn. 261; Alexander *v.* Penna. Co., 48 O. S. 623.

[3] Larwell *v.* Fund Society, 40 O. S. 275; Smith *v.* Bartram, 11 O. S. 690.

[4] Bank *v.* Baker, 15 O. S. 68.

[5] Hewitt *v.* Banking Co., 40 Neb. 820; 59 N. W. Rep. 693; Schrider *v.* Teghe, 38 Neb. 394; 56 N. W. 994; Elliott's Gen. Pr., sec. 433.

[6] Hadley *v.* Importing Co., 13 O. S. 502.

[7] Hombock *v.* Van Metre, 9 Ohio, 153; Kleine *v.* Katzenberger, 20 O. S. 110. See Freeman *v.* Rawson, 5 O. S. 1.

[8] Prentiss Tool & Supply Co. *v.* Shermer, 136 N. Y. 305.

[9] Krushell *v.* Anders, 26 S. W. Rep. 240.

[10] Smith *v.* Collins, 94 Ala. 394; 10 So. 334.

[11] Kleine *v.* Katzenberger, 20 O. S. 110; Ford *v.* Williams, 24 N. Y. 359; Miller *v.* Lockwood, 32 N. Y. 293; Parke *v.* Trading Co., 120 N. Y. 51.

Sec. 448. Identity.—The determination of a question of the identity of two causes of action when a plea of former adjudication is made, is, when it is necessary to introduce parol testimony to show their similarity, a question of fact to be determined by the jury.[1] Whether or not a person intended to be described in an indictment is the same person as is disclosed by the proof, is for the jury. But whether a mistake in a name in an indictment has misled or prejudiced the defendant, is a question for the court.[2]

Sec. 449. Negligence.—As stated in a previous section, negligence is a mixed question of law and fact.[3] Prof. Greenleaf has stated a simple rule which has been adopted by courts generally. The "judge is to inform the jury as to the degree of diligence, or care, or skill, which the law demands of the party, and what duty it devolves on him, and the jury are to find whether that has been done."[4] But the court must not force upon the jury his view of any fact or inference of fact.[5] Whether or not either party has exercised the exact measure of care required of him is a question for the jury.[6] There are just three rules to be observed in determining when questions of negligence are to be submitted to the jury which are clearly defined. In the first place, whenever the evidence in any case *tends* in any degree to prove all the facts by which the plaintiff must establish his action, it should be submitted to the jury to be weighed by them.[7] Or where the facts claimed to constitute negligence are of doubtful meaning, from which different minds may arrive at different conclusions.[8] Or where the evidence of negligence, contributory negligence and proximate cause is conflicting, it should be submitted to the jury.[9] But if all of the facts touching the alleged negligence be undisputed, or be found by a jury, and admit of no rational inference but that of negligence, and the course which ordinary prudence would demand is apparent in such case, the question becomes one of law merely, and the court should so charge the jury.[10] A motion for a non-suit involves an admission of all the

[1] Youmans *v.* Caldwell, 4 O. S. 71; Tutt *v.* Price, 7 Mo. App. 194.

[2] Mead *v.* State, 26 O. S. 505.

[3] *Ante*, sec. 445; Railroad Co. *v.* Fitzpatrick, 31 O. S. 479; Railroad Co. *v.* Rathgeb, 32 O. S. 66; Rairoad Co. *v.* Krause. 30 O. S. 222; Railroad Co. *v.* Fleming, 30 O. S. 480.

[4] 1 Greenl. Ev., (15th Ed.) sec. 49*n*.

[5] *Id.*

[6] Healey *v.* Railroad Co., 28 O. S. 23.

[7] Stockstill *v.* Railroad Co., 24 O. S. 83; Kelly *v.* Howell, 41 O. S. 438; Wells *v.* Railroad Co., 9 O. C. C. 340.

[8] Railway Co. *v.* Picksley, 24 O. S. 654; Snell *v.* R. R. Co., 9 O. C. C. 350.

[9] Union Stock Yards Co. *v.* Congyer, 38 Neb. 488; 59 N. W. 950; O'Malley *v.* Railway Co., 113 Mo. 319; Webb *v.* R. R. Co., 49 N. Y. 420.

[10] Railroad Co. *v.* Crawford, 24 O. S. 631; Pennsylvania Co. *v.* Rathgeb, 32 O. S. 66; Beisiegal *v.* R. R. Co., 40 N. Y. 9; B. & O. R. R. Co. *v.* Stoltz, 18 O. C. C. 93.

facts which the evidence tends in any degree to prove, and presents only a question of law whether each fact is indispensible to the right of action, and put in issue by the pleadings, has been supported by some evidence. If it has, the matter should be submitted to the jury.[1]

The scintilla rule is settled by numerous adjudications that where there is evidence which *tends* to prove negligence,[2] or where there is *some* evidence,[3] even though slight,[4] the question should be submitted to the jury. The serious question to be considered by the court is held by some authorities not whether there is no evidence, but whether the jury may find a verdict from it against the alleged negligent person, and whether the court would be compelled to set the same aside if so found.[5] Some courts have adopted the rule that if in the opinion of the court there is not enough evidence to sustain a verdict should one be found, and the court would be called upon to set it aside, the question might just as well be decided by the court in the first instance as matter of law. But this is not so in Ohio, this State still following the scintilla rule that where the evidence tends to prove the allegations it must be submitted to the jury, although it has been claimed that the supreme court virtually repudiated the rule in a decision which was not reported. But we must be governed by the decisions appearing in the reports.

When there is nothing which in law tends to justify or excuse negligence, it is not only the right but the duty of the trial judge to say to the jury that such omission is negligence, and then, if it tends to prove that such negligence was the direct or proximate cause of the injury, to submit that question to the jury; if the evidence does not so tend, a verdict should be directed for the defendant. Whether or not the evidence so tends, is a question of law for the court, and not of fact for the jury.[6]

Sec. 450. Payment.—Sometimes the burden of proving payment is upon the defendant ; this is so where non-payment is not one of the facts which plaintiff must prove to make his case.[7] Where there is a special agreement as to the matter it must be determined by the jury.[8] The question whether a demand of long standing has been paid by reason of the solvency of the

[1] Ellis *v.* Ins. Co., 4 O. S. 628.

[2] Stockstill *v.* Railroad Co., 24 O. S. 83; Kelley *v.* Howell, 41 O. S. 438; Wells *v.* R. R. Co., 9 O. C. C. 340; Snell *v.* R. R. Co., 9 O. C. C. 348.

[3] Johnson *v.* R. R. Co. 18 Neb. 690; Flori *v.* St. Louis, 3 Mo. App. 231.

[4] Moore *v.* R. R. Co., 2 Mackay 437; Dick *v.* Railroad Co., 38 O. S. 389; Smith *v.* Gillett, 50 Ill. 290.

[5] Baulien *v.* Portland Co., 48 Me. 291; Greenleaf *v.* R. R. Co , 29 Ia. 22; Cagger *v.* Lansing, 64 N. Y. 417.

[6] Street Railway Co. *v.* Murray, 53 O. S. 570, 585.

[7] Kinkead's Plg., sec. 75-1 (2d ed.).

[8] Merrick *v.* Boury, 4 O. S. 60.

debtor, is for the jury to decide. The presumption that it has been is not conclusive.[1]

Sec. 451. Probable cause is a mixed question of law and fact. The court must leave the facts with the jury, with instructions as to what is probable cause.[2] Storer, J., says: "When it is said that what is probable cause is for the decision of the court, and the truth of the facts upon which it is predicated for the jury, no new doctrine is asserted. It is but the utterance of what we read in every carefully digested and well reasoned legal adjudication upon the subject. There is no doubt of what the rule is in England. . . Indeed, the doctrine has become so undisputed that he must be a bold man to question it. In the United States we find a series of decisions asserting the same principle.[3] As to what the court should charge the jury upon this question, the author has given in another volume.[4]

Sec. 452. Reasonableness or unreasonableness.—"Reasonableness in these cases," said Coke, "belongeth to the knowledge of the law, and therefore to be decided by the justices."[5] Questions which fall under the head of what we may term reasonableness or unreasonbleness, cover a great variety of subjects. It may refer to time, laws, ordinances, by-laws, regulations and rates by railroads, and one general principle may cover the whole range, and it is the same principle that runs into questions of negligence. It may be a question of law, of fact, or mixed question of law and fact.[6] The problems may be solved in the same manner as in the case of negligence. If the facts are in dispute, or if there can be more than one reasonable inference drawn from them, it should be submitted to the jury for its determination under proper instructions.[7] But where the material facts are admitted, or are not in dispute, and there can be only one inference drawn therefrom, it then becomes a question of law.[8] The application of this principle should render the question in any given case less difficult of solution, yet there appears to be considerable conflict.[9] Whether a certain rate of freight fare fixed by legislative enactment is reasonable, being a matter from which different inferences may be drawn, should be submitted to

[1] Cole *v.* Kerr, W. 675.

[2] Ash *v.* Marlow, 20 Ohio, 119. "What facts and circumstances amount to probable cause is a pure question of law." Stone *v.* Crocker, 24 Pick. 84.

[3] Doll *v.* Schoenberg, 2 Disney, 54.

[4] Kinkead's Instructions, No. 339.

[5] Coke Lit., 56*b*.

[6] Bassenhorst *v.* Wilby, 45 O. S. 333.

[7] Bassenhorst *v.* Wilby, 45 O. S. 333; Meriden S. P. Co. *v.* Flory, 44 O. S. 430; Mead *v.* Parker, 111 N. Y. 259; Hoxie *v.* Iiams, 26 Neb. 616; Gladwell *v.* Holcomb, 14 O. C. C. 416.

[8] Bassenhorst *v.* Wilby, *supra;* Wright *v.* Bank, 110 N. Y. 237; Cookingham *v.* Dusa, 41 Kan. 229.

[9] Elliott's Gen. Pr., sec. 442, and cases cited.

the jury.[1] Whether a suit upon a note was commenced within a reasonable time after notice given by the sureties, is a question for the court.[2] Whether or not an ordinance is reasonable is universally a question for the court, and not for the jury.[3] And so the reasonableness of regulations made by a corporation is usually decided by the court; and where an employe willfully disobeys the same and is injured he cannot then claim that their reasonableness is a question to be decided by a jury.[4]

Sec. 453. Slander or libel—.Where the words spoken are actionable *per se* it is the province of the court to so instruct the jury. Whether the language will sustain a charge of libel or slander is a question of law, but whether it had a slanderous meaning in the connection in which it was used may be a question for the jury.[5]

Sec. 454. Total loss under insurance policy.—The question whether a loss under an insurance policy is total or partial is for the jury to determine.[6]

[1] Peters *v.* Railroad Co., 42 O. S. 275; Smith *v.* Railway Co., 23 O. S. 10.

[2] Meriden S. P. Co. *v.* Flory, 44 O. S. 430.

[3] Holmes *v.* Pickering, 3 W. L. J. 222; 7 Lawson's Rights and Rem., sec. 3981.

[4] Wolsey *v.* Railroad Co., 33 O. S. 227.

[5] Van Ingen *v.* Newton, 1 Disn. 482; State *v.* Smily, 37 O. S. 30; Tappan *v.* Wilson, 7 O. (pt. 1) 191.

[6] Phœnix Ins. Co. *v.* Port Clinton Fish Co., 14 O. C. C. 160.

CHAPTER XXIII.

MEANS OF SECURING ATTENDANCE OF AND ANSWERS BY WITNESSES.

SEC.
455. Subpœna — *Ad testificandum duces tecum.*
456. Subpœna for witnesses.
457. Subpœna *duces tecum.*
458. Service of subpœna.
459. Service of subpœna in and out of county.
460. Witness may demand fees in advance.
461. Contempt for disobedience of subpœna.
462. When witness is and is not in contempt for refusing to answer questions.
463. Same, continued—Power of notary.
464. Witness must make oath.
465. Attachment against witness.
466. Witness not compelled to attend out of county of residence.
467. Official custodian may be compelled to produce papers in another county.

SEC. 455. Subpœna—Ad testificandum, duces tecum.—A subpœna is a writ issued in an action, at the instance of plaintiff, requiring the person to whom it is directed to appear at a specified time and place for a specified purpose, under penalty.[1] It is issued by the clerks of the several courts (and others), under the seal of the court. It contains the names of the witnesses to be subpœnaed and may be served by the sheriff, coroner, any constable of the county, by the party, or by any other person, but when served by a person other than one of the officers mentioned, proof of service must be shown by affidavit.[2] The writ is directed to the person whose testimony is sought, and commands him to appear at the time and place mentioned to testify, and it may also require him to bring with him[3] any book, writing, or other thing under his control which may be required as evidence.[4]

When it is for the purpose of securing his deposition it is issued by the officer before whom such deposition is to be taken.[5]

SEC. 456. Subpœna for witnesses.—A subpœna is issued by clerks of the several courts, and judges of probate courts, to compel the attendance of witnesses, upon application by the filing of a precipe by one of the parties to the suit. All the names required by the one filing the precipe should be inserted

[1] Sweet's L. Dict.
[2] R. S., sec. 5246.
[3] *Duces tecum.*
[4] R. S., sec. 5247.
[5] R. S., sec. 5248.

in one subpœna. A subpœna may be issued by an officer before whom depositions are taken.

The subpœna should be directed to the person therein named, requiring him to attend at a particular time and place, to testify as a witness.[1] Counsel should attend to the matter of having subpœnas issued for his witnesses without delay, so that he may give them abundant opportunity to prepare for attendance upon the trial. It is not safe to place entire reliance upon the officers whose duty it is to issue and serve the same, for they have not the same interest in the matter that counsel has, and while it is generally presumed that the sheriff will perform his whole duty in the matter, yet he will not consider it his duty to make an extra effort to find and serve a witness who is difficult to find. Therefore it is the duty of counsel to ascertain definitely the location of his witnesses, and place them on his precipe, and then, even, it is wise to go personally to the sheriff and see that he understands the matter. An eminent author has expressed the view that a witness in a civil cause has a right to have due notice in order to refresh his memory, and to arrange his business so as to enable him to testify.[2] This view will readily be acquiesced in. But counsel should, shortly before subpœnaing the witnesses, or shortly before trial, see them personally, and have an interview with them, so as to be satisfied that their testimony will be just what is needed, so that they may not be called unnecessarily. And indeed it is sometimes dangerous to call witnesses whose testimony will be of doubtful character, as it may result in doing more harm upon cross-examination.

Sec. 457. Subpœna duces tecum.—A subpœna may contain a clause directing a witness to bring with him any book, writing or other thing under his control, which he may be compelled to produce as evidence.[3] This is called a subpœna *duces tecum.* The application for a subpœna *duces tecum* is made in the same manner as an ordinary writ. It must contain words commanding the witness to testify as well as to produce evidence, for it would be otherwise fatally defective.[4] In must describe with a proper degree of certainty the papers or documents desired, and they should not be described in a general way, as all papers relating to a particular subject,[5] or requiring a druggist to bring all prescriptions from a certain date.[6] It is

[1] Whittaker's Civ. Code, secs. 5246, 5247, 5248.
[2] Wharton's Ev., sec. 377.
[3] Whittaker's Civ. Code, sec. 5247.
[4] Murray *v.* Elston, 23 N. J. Eq. 212.
[5] Elting *v.* United States, 27 Ct. Cl. 158; United States *v.* Babcock, 3 Dillon, 566.
[6] State *v.* Davis, 117 Mo. 614.

certainly improper to make the witness the judge of what papers will in any wise bear on the merits of a variety of questions. The court will assist a party to obtain documents or papers in the possession of other parties only when he knows what he wants, and when he can designate them with some degree of particularity. Mere belief that one has papers will not warrant the issue of a subpœna *duces tecum*.[1] It has been held, however, that a subpœna directed to a manager of a telegraph company to produce telegrams between certain parties without designating the dates is sufficiently definite.[2] The subpœna *duces tecum* should ordinarily state the names of the parties sending or receiving the telegrams, as well as to state the periods between which the messages were sent, or if that be not known, then the subject-matter of which they contain or to which they relate should be given.[3] This kind of a subpœna must state the reason why the person is to appear or what he is to do when he appears; otherwise it will be fatally defective.[4] The fact that a witness in response to a subpœna *duces tecum* delivers the documents into the possession of his attorney will not be considered as a compliance with the writ.[5] A second subpœna cannot be issued while the first remains unexecuted and unreturned.[6]

Sec. 458. Service of subpœna.—The writ may be served by the sheriff, coroner, or any constable of the county, or by a party, or any other person; if served by one other than an officer, proof of service must be shown by affidavit.[7] Service by "any other person" may permit a party to a suit to make the service, as it has been held under a statute permitting service to be made by any disinterested person who may be a competent witness in the cause, that a party to a suit, though interested, may serve the writ.[8] It may be served by reading or by copy delivered to the witness, or left at his usual place of residence. The copy need not contain the name of any other witness.[9]

Sec. 459. Service of witness in and out of county.—The witness may be subpœnaed if found in the county where suit is brought, but in general is not compelled to go out of his own county, except to an adjoining county. The exceptions to this rule are:

[1] Elting *v.* United States, 27 Ct. Cl. 158.

[2] *In re* Storror, 63 Fed. 564.

[3] United States *v.* Hunter, 15 Fed. 712.

[4] Murray *v.* Elston, 23 N. J. Eq. 212.

[5] Edison Light Co. *v.* Electric Lighting Co., 44 Fed. 294.

[6] Elting *v.* United States, *supra*.

[7] R. S., sec. 5246.

[8] Larimore *v.* Bobb, 21 S. W. 922; 114 Mo. 446.

[9] R. S., sec. 5249.

1. When the suit has been taken by change of venue to another county, and even then he is not bound to go unless his fees and mileage are tendered according to law.

2. Where the witness is the official custodian of any paper or document needed as evidence at the trial, which cannot be lawfully attached as an exhibit to a deposition, in which case the judge before whom the cause is being tried may compel a witness from another county to bring the needed document. Here also the witness must receive or be tendered his fees.[1]

A witness cannot be compelled to go to another county to give his deposition,[2] except to an adjoining county, under the statute.

In civil actions the witness may always demand his fees for traveling and one day's attendance, at the time of service, and if not paid he is not liable for a failure to obey,[3] and the return must state the fact of demand and payment.[4]

Sec. 460. Witness may demand fees in advance.—A witness may demand his traveling fees and fee for one day's attendance when the subpœna is served upon him, and if the same be not paid, the witness shall not be obliged to obey the subpœna; and when the witness has attended upon court, he may in like manner demand his fees from day to day until discharged by the court.[5] The fact of such demand and payment or non-payment must be stated in the return by the officer; if the witness be not discharged on the day he is notified to appear, then the fact of payment or non-payment must be noted by the clerk in the witness book.[6] A witness cannot be compelled to testify until his fees are paid.[7]

Sec. 461. Contempt for disobedience of subpœna.—Disobedience of a subpœna, a refusal to be sworn, except in case of a refusal to pay fees on demand,[8] a refusal to answer as a witness, or to subscribe a deposition, when lawfully ordered, may be punished as a contempt of the court or officer by whom the attendance or testimony of the witness is required.[9]

Sec. 462. When witness is and is not in contempt for refusing to answer questions.—A witness is not bound to answer every question which may be propounded to him, and can therefore

[1] R. S., sec. 5250.

[2] R. S., sec. 5250; Mylius *v.* R. R. Co., 31 Kan. 234.

[3] See contempt, R. S., sec. 5252, *et seq.*; U. P. Ry. Co. *v.* Harris, 29 Kan 275.

[4] R. S., sec. 5251.

[5] R. S., sec. 5251. A witness cannot, it is held, be punished for contempt when his fees have not been tendered. Bonner *v.* People, 40 Ill. App. 628; U. P. Ry. Co. *v.* Harris, 29 Kan. 275.

[6] R. S., sec. 5251.

[7] Kipp *v.* Dawson, 60 N. W. 845; 59 Minn. 82. See Rozek *v.* Redzinski, 87 Wis. 525.

[8] Bonner *v.* People, 40 Ill. App. 628.

[9] R. S., sec. 5252.

only be punished for contempt for refusing to answer such questions as he is bound to answer. The object of the power conferred upon courts to punish witnesses for refusal to answer questions is the enforcement of the obligation which they assume to tell the truth. But this rule cannot do violence to another merciful provision relieving persons from giving testimony which may tend to criminate themselves. This is a privilege which is extended to all persons so that they may not be compelled to expose themselves to a criminal charge. It is an absolute privilege extended to a witness not called in his own behalf,[1] and does not extend to a party defendant in a criminal case who voluntarily testifies in his own behalf, and then refuses to answer questions on the ground that the answer will tend to criminate him.[2] This privilege is personal to the witness, and while it may be interposed by counsel, it cannot be so done by counsel solely. The wishes of the witness in the matter may be allowed to control.[3] The answer must be such as to expose the witness to a criminal charge, and not such as will bring him into disgrace not amounting to crimination. There are two points to be observed with respect to this matter. If the question and its answer bear directly upon the issues involved, the witness will then be compelled to testify, even though it will bring him in disgrace or injure his character. But if the matters inquired of the witness are collateral and irrelevant to the issues, then they come within the privilege, excusing the witness from answering.[4]

Whether or not a witness may refuse to answer a question which is incompetent, not pertinent or relevant to the issues involved, does not seem to have received much consideration. The object of an inquiry into such matters may sometimes be for the purpose of reflecting upon the character of the witness, and should in such instances be discouraged, and not allowed to assume too wide a range.[5] Aside from collateral questions reflecting upon the credit of the witness, it has been said that to hold for contempt in refusing to answer a question it should be shown that the question was pertinent and relevant, that a witness is not bound to answer questions which are not legal and pertinent.[6] There is one thing quite certain, the question of competency is for the court, and when not involving a valid privilege and the court orders the witness to answer, he cannot

[1] Warner *v.* Lucas, 10 Ohio, 337; Ammon *v.* Johnson, 3 O. C. C. 263; Whittaker's Code of Ev., p. 445; 1 Greenleaf's Ev., sec. 451.

[2] Este *v.* Wilshire, 44 O. S. 636; Stover *v.* People, 56 N. Y. 315; Commonwealth *v.* Morgan, 107 Mass. 199; State *v.* Ober, 52 N. H. 459

[3] Ammon *v.* Johnson, 3 O. C. C. 269; Commonwealth *v.* Shaw, 4 Cush. 594; State *v.* Wentworth, 65 Me. 234.

[4] 1 Greenleaf's Ev. (15th ed.), secs. 454, 455, 456.

[5] 1 Greenl. Ev. (15th ed.), sec. 455.

[6] *Ex parte* Zeehandelaar, 71 Cal. 238; *In re* McKnight, 28 Am. St. Rep. 451; 4 W. L. B. 457; *Ex parte* Woodworth, 29 W. L. B. 315.

set his judgment as to its competency up against the court. And so when depositions are being taken before a notary, the question of competency of evidence being for the court on the trial of the action, the notary may therefore properly order the witness to answer whether the question be material or competent, and the witness must answer or be treated as a contumacious witness.[1]

But the supreme court have radically changed this rule by holding that a witness may be excused from answering an immaterial or incompetent question if it will tend to injure him in his business. While the court in the case adopting this rule justly held that the witness ought not to have been compelled to answer the question asked because it was wholly immaterial, yet it is a most dangerous rule which they have adopted, as it places it within the power of a witness to avoid answering questions on the ground that it will injure him in his business and is immaterial. Already parties are taking advantage of this decision.[2]

The statute reads, "when lawfully ordered," and hence the witness must be ordered by the court or officer, and he must refuse to answer before he is guilty of contempt.[3]

It is made the duty of the court to instruct the witness as to his rights in the matter, leaving him in the last resort to be the exclusive judge of what will be the tendency of his answers. There was some difficulty in arriving at this conclusion, but it was finally conclusively settled in an opinion by Chief Justice Cockburn in England, and followed in other cases[4] by allowing great latitude to the witness in judging for himself as to the effect of the particular question.[5]

In the trial of Col. Burr,[6] Chief Justice Marshall made the first attempt in this country to give a clear exposition of the practice of the court as to whether the witness is the judge as to whether his answer will tend to criminate him, or whether it belongs to the court to consider and decide whether any direct answer to it can implicate the witness. The question is one of vital importance to personal liberty. It was declared in that case that "it is the province of the court to judge whether any direct answer proposed, will furnish evidence against the witness;" that if the witness says on oath that he cannot answer without accusing himself, he cannot be compelled to answer. The supreme court of Ohio, when composed of judges of great ability, in a very early case refused to accept the doctrine of

[1] DeCamp *v.* Archibald, 50 O. S. 618.

[2] *Ex parte* Jennings, 60 O. S. 319.

[3] Burnside *v.* Dewstoe, 15 W. L. B. 197.

[4] See note to 1 Greenleaf's Ev. (15th ed.), sec. 451.

[5] Reg. *v.* Boyes, 1 B. & S. 311.

[6] U. S. *v.* Burr, 1 Rob. 215.

that case of universal application, and adopted the rule that the witness himself was to be the judge as to whether his answer will directly or indirectly criminate himself, holding that he should not reveal the secret locked up in his bosom by giving a reason why he declines to testify so as to enable the court to judge as to whether he should testify; that in giving his reasons he may furnish a necessary link in the chain of testimony against himself.[1] The practice now is for the court, as soon as a question is propounded which is likely to criminate a witness, to promptly advise the witness that he is not bound to answer the question, who may simply refuse to answer without explanation. There can be no inference drawn from such a refusal.[2]

Sec. 463. Same, continued—Power of notary.—There has been considerable controversy as to the power of notaries public, or other officer, while taking depositions to punish a witness for refusing to answer a question, until it has finally been settled that it is not the exercise of judicial power within the purview of the constitution.[3] But the notary has no power to punish as for contempt a witness who refuses to answer an immaterial, incompetent question, if the disclosure of such matter would be injurious to the business of the witness.[4] A person, resident of a county, not absent therefrom, nor intending to be, nor unable to attend court, from age, infirmity or imprisonment, there being no apparent reason why he will be unable to attend court, cannot lawfully be ordered to answer under notice to take depositions, and cannot be legally imprisoned for refusing to answer.[5]

A party to an action, though a resident of the county in which the action is pending and not intending to depart therefrom, nor unable to attend court by reason of sickness or infirmity, and who expects and intends to be present at the trial, may be compelled by the adverse party to give her deposition, and, in case of refusal, may be imprisoned for contempt.[6]

Sec. 464. Witnesses must make oath.—Before testifying the witnesses shall be sworn to testify to the truth, the whole truth, and nothing but the truth.[7] The bill of rights specially declares that no person shall be incompetent on account of religious belief, but that an oath or affirmation cannot be dispensed with. All witnesses must testify under the obligations of an oath or

[1] Warner *v.* Lucas, 10 Ohio, 337. See 1 Greenleaf's Ev. (15th ed.), sec. 451, notes 4, 5, 6*c*.

[2] 1 Greenleaf's Ev. (15th ed.), sec. 451; Phelin *v.* Kenderdine, 20 Pa. St. 354.

[3] DeCamp *v.* Archibald, 50 O. S. 618; Burnside *v.* Dewstoe, 15 W. L. B. 197.

[4] *Ex parte* Jennings, 60 O. S. 319.

[5] *Ex parte* Langford, 15 W. L.B. 267; Shaw *v.* Installation Co., 17 W. L. B. 274. See *In re* Nushuler, 3 W. L. B. 739.

[6] State *v.* Cost, 22 W. L. B. 250.

[7] Whittaker's Civ. Code, sec. 5260.

affirmation. One who believes in the existence of a God, and that an oath is binding on the conscience, is a competent witness, no matter what his belief is as to religious matters.[1] To render a witness competent to take an oath his moral nature must be strengthened, and his conscientiousness be quickened, by a belief in a supreme being who will certainly, either in this life or the life to come, punish perjury. And the universal opinion is that the oath may be administered in the mode believed to be the most binding on the conscience of the witness.[2]

A witness may, however, be competent to give evidence without being sworn, if the parties consent, or waive the administration of an oath;[3] and the court may act upon the professional statements of counsel, as if given under the sanction of an oath.[4]

Sec. 465. Attachment against witness.—When a witness fails to attend in obedience to a subpœna, the court or officer before whom his attendance is required may issue an attachment commanding his arrest.[5]

Sec. 466. Witness not compelled to attend out of county of residence.—A witness in a civil case cannot be compelled to go out of the county of his residence, except to an adjoining county, to testify in a civil case, except where cases have been removed from the county in which such witness resides by change of venue. A witness is not compelled to go out of the county in which he resides or is summoned unless the party subpœnaing him on demand pays him his regular mileage and per diem fees.[6] But in criminal cases he must go to any county in the State where he is subpœnaed.

Sec. 467. Official custodian may be compelled to produce papers in another county.—Where a witness is the official custodian of any paper or document necessary to be produced in the trial as evidence, which cannot be attached as an exhibit to a deposition, the judge of the court in which the cause is pending, upon being satisfied of the necessity, may order and compel such witness to bring such paper into court. Such witness may demand his fees, and need not attend unless they are paid.[7]

[1] Brock *v.* Milligan, 10 Ohio, 121; Clinton *v.* State, 33 O. S. 27, 32, 33.

[2] Cinton *v.* State, 33 O. S. 27, 33, 34.

[3] Elliott *v.* Plattor, 43 O. S. 198, 206.

[4] Murdock *v.* McNeeley, 1 O. C. C. 16, 17.

[5] R. S., sec. 5253. See more fully Whittaker's Code of Ev., pp. 448-51.

[6] R. S., sec. 5250.

[7] R. S., sec. 5250.

CHAPTER XXIV.

MODES OF TAKING TESTIMONY.

SEC.
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SEC. 468. Testimony, how taken.—The code[1] provides three modes for the taking of testimony of witnesses, namely: 1. By affidavit. 2. By deposition. 3. By oral examination.

SEC. 469. Testimony by affidavit.—Evidence by affidavit is the first authorized method, and may be used as evidence only on motions, or other cases permitted by law.[2] Affidavits may be used for many purposes in law,[3] but in the case mentioned is the only place where it may be used or considered as evidence, and then it is used merely during what we may appropriately term a preliminary hearing of a cause. It is not of a very high character of evidence, as a rule, because it is one-sided evidence, that is there is no opportunity afforded the opposite party for cross-examination.

SEC. 470. This chapter will discuss principally the mode of taking testimony by deposition, giving code provisions.

[1] Sec. 5261.
[2] R. S., sec. 5263.
[3] Whittaker's Code of Ev., 453.

Sec. 471. Depositions may be taken when.—The statute provides that either party may commence taking depositions at any time after service upon the defendant.[1] Another section of the code[2] provides when a deposition may be used, and the two provisions must be considered together. Under these provisions it has been considered entirely competent and proper for a party to a suit, who for any reason desires to take the deposition of a witness resident of the county, to do so, and that it is not necessary that any reason appear therefor in the deposition itself. A party has a right to protect himself against the contingency of death or absence of witness at the time of trial.[3] There is some conflict among the lower courts in Ohio upon the question of the right to take the depoistion of a party to a suit, or of a witness. The dispute hinging upon the statute relating to the use of the depositions and also as to whether it be a party or a witness whose deposition is sought to be taken. Another objection which is made to the taking of a deposition of a party, and it has been urged in some of the cases to the taking of the deposition of a witness, is, that an attempt to take the deposition of a party or witness when none of the facts mentioned in the statute providing when the deposition may be used, exist, it then amounts to a fishing expedition or a discovery of the facts which the other side will put forward in the litigation, and there is ample means afforded the parties for obtaining a discovery by means of interrogatories. There is a clear distinction between taking the deposition of a witness and a party observed by the courts, and the matter will be discussed separately in the next paragraphs.

Sec. 472. When may the deposition of a witness be taken.—Some courts have, as we have stated, held that the deposition of a witness cannot be taken when the witness is a resident of the county, is not absent therefrom, does not intend to be, is not by reason of age, infirmity or imprisonment, unable to attend court, and there is no probability, judging from his present condition, of being unable to attend court, and his testimony is not required upon a motion. It is contended in support of this rule, that any other rule would be subject to abuse, that a party might go fishing for evidence in possession of the opposite party, and to learn the case of his adversary. The courts taking this view hold that a witness should be justified in refusing to give his testimony, and that he would not be held amenable for contempt. This is in substance applying the statute relating to the use of depositions to the taking thereof, and requires a

[1] Sec. 5265.
[2] Sec. 5265.
[3] Meader *v.* Root, 11 O. C. C. 81.

showing of the presence of some one of the facts, either in the deposition, or in some other way at the trial.[1]

The true rule or construction of the statute relating to the taking of the deposition of a witness, considered in the light of the one relating to the use thereof, is the contrary to what has just been stated, and that the testimony of a witness may be taken at any time, even though he is in the county and does not intend to depart, and is in good health, and will probably be able to attend court as a witness when the case is reached.[2]

The statute says that either party may commence taking testimony by deposition at any time after service upon the defendant,[3] whether the case is at issue or not.[4]

As stated in a preceding section, it is entirely competent, and it is the undoubted intention of the statute to authorize a party to protect himself against the contingency of the death, or the absence of a witness at the time of the trial. Whether or not it is proper under the statute for a party to go on a fishing expedition and examine a *witness* for the sole purpose of discovering what the testimony of the adversary will be, has not been decided in Ohio, but it would seem that such a practice should not be encouraged, but that depositions should only be taken when there is danger of the witness being unable to testify at the trial.

When a deposition may be used, or whether or not the deposition of a party may be taken for purposes of discovery, are different questions.

Sec. 473. May the deposition of a party to a suit be taken before trial?—It would seem that it would be perfectly right and proper for one party to a suit to take the testimony of the adversary at any time before trial, when the testimony is sought in good faith, when it is likely that such party will likely not be able to attend at the trial. The statute also authorizes a party to compel the adverse party to testify orally, or by deposition, as any other witness.[5] But where the purpose or object of taking the testimony is, not to secure testimony to use in behalf of the party

[1] *Ex parte* Langford, 15 W. L. B. 267; *In re* Pfirman, 1 Ohio Dec. 177. The courts adopting this rule claim that there is a conflict between certain decisions in Kansas, under a statute the counterpart of the one in Ohio, when the fact is otherwise; the distinction is made in the Kansas cases between taking the testimony of a witness and of a party to the suit, the cases in that State holding that the testimony of a witness can be taken without a showing of the existence of some one of the facts authorizing their use, but that the testimony of a party cannot be so taken when the purpose is merely to fish out evidence.

[2] Shaw *v.* The Ohio Edison Installation Co., 17 W. L. B. 274; *Ex parte* Mushuler, 3 W. L. B. 739; *In re* Merkle, 40 Kan. 30; *In re* Ables, 12 Kan. 451.

[3] R. S., sec. 5266.

[4] Buss *v.* Horrocks, 8 W. L. J. 419.

[5] R. S., sec. 5243.

upon the trial, but to cross-examine the adverse party in order to secure information which will enable the party to prepare his case for trial, with no idea of using it at the trial, unless it be found to be in his favor, or where the purpose is to take the testimony for the purpose of discovery and to enable the party to develop his case, it is not considered in the interest of fair dealing, nor is it proper practice, and the party may under such circumstances refuse to testify without becoming liable to contempt.[1]

Sec. 474. When a deposition may be used.—The deposition of a witness may be used only in the following cases: 1. When the witness does not reside in, or is absent from, the county where the action or proceeding is pending, or by change of venue is sent for trial. 2. When the witness is dead, or, from old age, infirmity, or imprisonment, is unable to attend court. 3. When the testimony is required upon a motion, or where the oral examination of a witness is not required.[2] When a deposition is offered to be read in evidence, it must appear, to the satisfaction of the court, that for a cause specified in the statute just quoted, the attendance of the witness cannot be procured.[3] A deposition cannot be read if the witness is present in court,[4] although it has been held not to be an objection where the witness has been in attendance upon the court, and is believed to be on his way to the place of trial.[5] The reasons which authorized the taking of depositions which existed at the time they were taken will be presumed to still exist at the time of the trial, nothing appearing to the contrary.[6]

Sec. 475. Witness whose deposition is taken must be competent at time of trial.—The deposition speaks as of the day of trial, and the competency of the witness must be governed by the circumstances and conditions at that time. It follows that a deposition cannot be read in evidence in the trial if the witness would be incompetent if he were present in court,[7] though the incompetency may be waived, which waiver will hold good throughout the entire trial.[8]

For example, where the deposition of a party to a suit has been taken, and before trial the adverse party dies and his

[1] *In re* Humphrey, 14 O. C. C. 517; 7 Oh. Dec. 603; Thomas *v.* Beebe, 5 O. N. P. 32; *In re* Davis, 38 Kan. 408; *In re* Cubberly, 39 Kan. 291.

[2] R. S., sec. 5265.

[3] R. S., sec. 5281; Everett *v.* Tidball, 34 Neb. 803; Norris *v.* Norris, 3 Ind. App. 500.

[4] Bogie *v.* Nolan, 96 Mo. 85.

[5] Waite *v.* Teeters, 36 Kan. 604; Fullenwider *v.* Ewing, 30 Kan. 15; Eby *v.* Winters, 51 Kan. 777.

[6] Hennessy *v.* Niagara Fire Ins. Co., 8 Wash. 91.

[7] Fagin *v.* Cooley, 17 Ohio, 44; Bettman *v.* Hunt, 12 W. L. B. 286.

[8] Choteau *v.* Thompson, 3 O. S. 424.

executor or administrator is made a party, such deposition cannot be used because of the statute prohibiting a party from testifying when the adverse party is an administrator or executor.[1]

But, of course, where this statute is not involved between the parties, the death of the witness does not render the deposition incompetent, as one of the objects of the statute authorizing depositions is to enable a party to protect himself against the contingency of the death of his witness.[2] It is not necessary to show the reason for taking the deposition in the deposition itself.[3]

Sec. 476. Testimony taken by referee, &c., may be used as a deposition.—Testimony taken in an action or proceeding, on the order of a court, by a referee, master commissioner, subscribed by the witness, and reported to the court by the officer, may be used as a deposition taken in the case.[4] Thus, a deposition given by a witness who died before the trial has been held admissible in a subsequent trial of the case.[5] So, also, where a party whose testimony is taken and transcribed by a judge of the probate court and signed by the witness, the same may afterwards be offered in evidence against the witness who has become a defendant in another cause on the identical matter concerning which he had been examined.[6]

Sec. 477. Who may take depositions in the State.—Depositions may be taken in the State before a judge or the clerk of the supreme court, a judge or clerk of the circuit court, a judge or clerk of the common pleas court, a probate judge, justice of the peace, notary public, mayor, master commissioner, official stenographer, or any person empowered by a special commission. When taken in the State to be used therein, they must be taken by an officer or person whose authority is derived within the State. If to be used out of the State, they may be taken before a commissioner or officer who derives his authority from the State, district or territory in which they are to be used.[7] A county surveyor,[8] a notary public,[9] official stenographers,[10] and the colonel, lieutenant colonel, major or adjutant of any regiment or battalion[11] are specially authorized to take depositions.

[1] Bettman *v.* Hunt, 12 W. L. B. 286; St. Clair *v.* Wadsworth, 16 O. S. 220; R. S., sec. 5242.

[2] Meader *v.* Root, 11 O. C. C. 81.

[3] *Id.*

[4] Whittaker's O. Code, sec. 5267. In a subsequent action growing out of the same subject-matter. Bonnett *v.* Dickson, 14 O. S. 434; Goode *v.* Patterson, 40 O. S. 345.

[5] Bonnett *v.* Dickson, *supra.*

[6] Goode *v.* Patterson, *supra.*

[7] R. S., sec. 5269.

[8] R. S., secs. 1175, 1188, 1191.

[9] R. S., sec. 118.

[10] R. S , sec. 481.

[11] R. S., sec. 3107–55 (Bates).

The officer before whom depositions are taken must not be a relative or attorney of either party, or otherwise interested in the event of the action or proceeding.[1]

Sec. 478. Who may take depositions out of the State.—Depositions may be taken out of the State before a judge, justice, or chancellor of any court of record, a justice of the peace, notary public, mayor, or chief magistrate of any municipal corporation, a commissioner appointed by the governor of this State to take depositions, or any person authorized by a special commission from this State.[2] A clerk of a court of record of a sister State is not one of the officers authorized by this provision to take depositions.[3] The omission of a statutory requirement destroys the competency of the depositions as evidence when objected to.[4] So it is considered that depositions taken without the State to be used within the State, before an officer other than those authorized by the statute of the home State are not admissible.[5]

Sec. 479. Special commission to take depositions.—Any court of record of this State, or a judge thereof, may grant a commission to take depositions within or without the State. The name of the person or persons to whom it is issued must be mentioned therein;[6] and the issuance of a commission without such name will be irregular.[7] When depositions are taken under a special commission granted by the court, they must be taken upon written interrogatories, unless the parties agree that they shall be taken on oral interrogatories as in ordinary cases.[8]

Sec. 480. Notice to take depositions—When to be given.—In all cases except where a special commission is issued, written notice of the intention to take a deposition must be given to the adverse party.[9] The right to take and read depositions not being a common law right, the statutory provisions should be followed closely; hence a deposition taken without notice, or the statutory notice, cannot be read,[10] unless the parties have waived the same by appearing and taking part in the examination.[11] And the record should show that notice has been prop-

[1] R. S., sec. 5271. See Weeks on Dep., sec. 285.

[2] R. S., sec. 5270.

[3] Fitch *v.* Campan, 31 O. S. 646.

[4] Bolds *v.* Woods, 9 Ind. App. 657. See also Baker *v.* Dessanes, 49 Ind. 28; Barnett *v.* Leonard, 66 Ind. 422.

[5] Bolds *v.* Woods, *supra;* Thompson *v.* Wilson, 34 Ind. 94.

[6] R. S., sec. 5272.

[7] Rupert *v.* Grant, 6 S. & M. 433.

[8] R. S., sec. 5272.

[9] R. S., sec. 5273.

[10] Houpt *v.* Houpt, W. 156; Weeks on Dep., sec. 239.

[11] Brown *v.* Raft, 1 Handy, 15; Ryan *v.* O'Connor, 41 O. S. 368. See Weeks on Dep., sec. 277.

erly given.[1] Persons who have been made parties to an action subsequent to the giving of notice to take depositions in the cause, must, if they desire to object upon that ground, do so specifically, and will waive notice by objecting only to the competency of the testimony.[2]

Sec. 481. What the notice must state.—The notice must specify the action or proceeding, the name of the court or tribunal in which the deposition is to be used, the time and place where it will be taken, and, in each case the deposition of a party to the suit be taken, it cannot be used in his own behalf, unless the notice specifies that his deposition would be taken.[3] Evidence of a deposition taken at a time other than that specified in the notice without appearance by the complaining party, cannot be admitted.[4] Where the notice specifies that the taking of a deposition will be adjourned from day to day, the officer before whom they are taken may, at the instance of the attorney for the party giving notice, adjourn the taking from day to day.[5] The notice should specify the place where the deposition is to be taken, stating definitely the office or room where it is to be taken, although it has been held that a notice merely designating a certain town is sufficient.[6] But the statute does not require that it shall state the name of the magistrate or officer before whom they are to be taken, nor the names of the witnesses whose testimony is to be taken.[7]

The notice may cover more than one suit, if definite notice be given of an intention to take depositions in the suit then on trial.[8] If a notice fails to state that the deposition of a party to the suit is to be taken, and no objections are made before the commencement of the trial, the same will be considered waived.[9]

A deposition filed but not used by the party taking it, may be used by the other party;[10] and if read by the party who did not take it, notice is thereby waived.[11]

Sec. 482. Service of notice—Within what time.—The notice must be served upon the adverse party, his agent or attorney of record, or left at the usual place of abode of such party or his agent,[12] and the deposition can only be used against such parties as are served

[1] Collins *v.* Lowry, 2 Wash. (Va.) 75.
[2] Ryan *v.* O'Connor, *supra.*
[3] R. S., sec. 5273.
[4] Peterson *v.* Albach, 51 Kan. 150.
[5] R. S., sec. 5173; Kelley *v.* Martin, 36 Pac. 705; 53 Kan. 380; Leach *v.* Leach, 46 Kan. 724. See Babb *v.* Aldrich, 45 Kan. 218. See Weeks on Dep., sec. 253.
[6] Strew *v.* Dye, 2 W. L. M. 388; Mills *v.* Dunlap, 3 Cal. 94. *Contra;* Crozier *v.* Gano, 1 Bibb. 257.
[7] Neely *v.* Harris, Tapp. 209; R. S., sec. 5273.
[8] Ash *v.* Marlow, 20 O. 119. 127.
[9] Crosby *v.* Hill, 39 O. S. 100—105.
[10] Wilson *v.* Runyon, W. 651.
[11] Devinney *v.* Jelly, Tapp. 127.
[12] Weaver *v.* Lessee, 2 O. S. 593.

with notice in one of the modes prescribed. The notice must be served so as to allow the adverse party sufficient time, exclusive of Sundays, the day of service, and one day for preparation, to travel by the usual routes and modes of conveyance to the place named in the notice.[1] If notice is not attached to the deposition, service may be proven by one of the attorneys.[2] Service of a notice is insufficient if it be merely left at the office of the adversary's attorney ; when it is served on the agent or attorney it must be personal.[3] A deposition taken upon such service of notice may be stricken from the files on motion.[4]

Sec. 483. Notice by publication may be given when the party against whom a deposition is to be read is absent from, or a non-resident of the State, and has no agent or attorney of record therein. The publication must be made for three consecutive weeks, in a newspaper printed in the county where the action or proceeding is pending. The publication must contain all that is required in a written notice, and may be proved in the manner prescribed for constructive service.[5] Service is complete at the date of last publication.[6]

Sec. 484. Form of notice by publication.—A. B., the defendant in the case of C. D., plaintiff, against A. B., defendant, No. — on the docket, and now pending in the court of ——— county, Ohio, who is absent from (or a non-resident) of said county, is hereby notified that on the — day of ——, 19—, the undersigned C. D., plaintiff in said cause, will take the depositions of [*name the witnesses*] to be used as evidence in the trial of said cause, at ——— [*state definitely the place*], in the county of ———, and State of Ohio, between the hours of — o'clock A. M. and — o'clock P. M. of said day, and that the taking of said depositions will be adjourned from day to day, between said hours, until completed. A. B.

E. F., *Attorney.*

Sec. 485. By whom deposition to be written.—The statute requires that the deposition be written in the presence of the officer before whom it is taken, either by the officer, the witness, or some disinterested person, and subscribed by the witness.[7] Depositions are now most commonly taken by a stenographer, in shorthand, and afterward written out by typewriter, not in the presence of the witness, but subscribed by him after written

[1] R. S., sec. 5273.
[2] Ash *v.* Marlow, 20 O. 119, 128.
[3] Walker *v.* Devlin, 2 O. S. 593, 605; Jonas *v.* Smith, 2 C S. C. R. 63.
[4] Jonas *v.* Smith, 2 C. S. C. R. 63.
[5] R. S., secs. 5274, 5051.
[6] R S., sec. 5051.
[7] R. S , sec. 5275.

out. This is held in Ohio to be a good deposition,[1] though the contrary is held by a United States court.[2] But where a deposition is written in the absence of the officer, and, presumably, where written out by a stenographer in the absence of the witness, without objections, the same will be valid.[3] A deposition taken with a typewriter is reduced to writing within the meaning of the statute,[4] it not being essential to the validity thereof that it be written in longhand.[5] The practice is frequently followed for the convenience of witnesses to have the latter sign the stenographic notes, or the witness may be required to return when the same has been written out and then attach his signature.

Sec. 486. Sealing, endorsing and transmitting deposition.—The deposition must be sealed in an envelope, endorsed with the title of the cause, and the name of the officer before whom it was taken, and such officer must address and transmit the same to the clerk of the court where the action or proceeding is pending. It shall be opened only by the clerk, by order of court, or at the request of a party to the action, or his attorney.[6]

Depositions endorsed only by the first letter of the names of plaintiff and defendant have been excluded.[7]

It is a substantial compliance with the code if the address to the clerk is written on an outer sealed envelope enclosing another sealed envelope, the latter of which contains the deposition.[8]

Sec. 487. Before what courts depositions may be used.—Depositions may be used on trial of any civil action or proceeding before a justice of the peace, mayor or other judicial officer of a municipality, before arbitrators, referee or master.[9]

Sec. 488. Use of depositions in other cases.—A deposition may be read in any stage of the action or proceeding, or in any other action or proceeding upon the same matter between the same parties, subject, however, to certain exceptions as may be taken thereto under the code.[10]

There must be an identity of parties and identity of question or matter in issue in the two cases, unless the deposition is used to con-

[1] Saunders *v.* Kinchler, 7 W. L. B. 270.
[2] Moller *v.* United States, 57 Fed. 490.
[3] See Logan v. Steele, 3 Bibb. 230.
[4] Behrensmeyer *v.* Kreitz, 26 N. E. 704; 135 Ill. 591.
[5] Wolfert *v.* Steibel, 4 O. N. P. 336.
[6] R. S., sec. 5276.
[7] Pelzer Mfg. Co. *v.* Sun Fire Office, 15 S. E. 562; 36 S. C. 213.
[8] Evans *v.* Reynolds, 32 O. S. 163.
[9] R. S., secs. 5277, 6544.
[10] R. S., sec. 5278; Shepherd *v.* Willis, 19 O. 142.

tradict a witness.[1] The adverse party must have had an opportunity to cross-examine the witness.[2] An examination of a debtor under the statute in aid of execution may be used in an action against the one examined to set aside a deed in fraud of creditors.[3] A witness not a party to a suit cannot be contradicted by statements made in a deposition given by him in a former suit in which the parties in the suit were not parties, and in reference to which deposition no inquiry was made of the witness.[4]

Sec. 489. Certificate of authentication.—When depositions are taken by an officer authorized to take depositions, whether resident of the State or elsewhere, they will be admitted upon the certificate of such officer, under the seal of the court of which he is an officer, or his official seal, without further authentication. If taken before an officer who has no official seal, and taken without the State, in addition to certificate and signature of the officer, they shall be authenticated either by parol proof in court, or by the certificate and seal of the secretary of State. If taken by an officer not having a seal within the State, or under a special commission, no further authentication than the official signature of the officer is necessary.[5]

Sec. 490. Certificate of officer.—The officer before whom the deposition is taken shall annex thereto a certificate showing the following facts: 1. That the witness was first sworn to testify to the truth, the whole truth and nothing but the truth. 2. That the deposition was reduced to writing by some proper person, naming him. 3. That the deposition was written and subscribed in the presence of the officer certifying thereto. 4. That the deposition was taken at the time and place specified in the notice. If the deposition be taken out of the State by an officer authorized to take the same, the certificate may be in the foregoing form, or in the form authorized by the laws of the place where taken.[6] If there be a substantial conformity with the requirements of the statute, they will not be suppressed on technical grounds.[7] While the officer must certify that the witness was *first* sworn, the provision will be complied with if this be certified in some part of the deposition, as at the commencement.[8]

[1] Weeks on Dep., sec. 470.
[2] Stewart *v.* Register, 108 N. C. 588.
[3] Goode *v.* Patterson, 40 O. S. 345.
[4] Aldrich *v.* Marcellus, 3 O. C. C. 500.
[5] R. S., sec. 5279.
[6] R. S., sec. 5280
[7] Behrensmeyer *v.* Kreitz, 135 Ill. 591; McCrillis *v.* McCrillis, 38 Vt. 135.
[8] House *v.* Elliott, 6 O. S. 497; Timms *v.* Wayne, 1 Handy, 400.

Sec. 491. When depositions to be filed.—Every deposition intended to be read in evidence on the trial must be filed at least one day before the trial,[1] though this requisition may be waived by proceeding to trial without objections.[2]

Sec. 492. Exceptions to depositions—When and how taken.—The course to be pursued in taking exceptions to questions propounded in taking depositions is possibly the thing with which the practitioner should be most familiar. The code provides that: Exceptions to depositions shall be in writing, shall specify the grounds of objection, and shall be filed with the papers in the cause.[3] It also provides that: No exception other than for incompetency or irrelevancy shall be regarded, unless made and filed before the commencement of the trial.[4] Interpreting that provision, if any it needs, it means that all objections relating to the *form of the question* or deposition, to be available to the party, must either be made and entered at the time the deposition is being taken, or previous notice of such objection is made in the manner pointed out by the code, by filing written objections before the commencement of the trial. If objections to parts of depositions, merely formal in their nature, are not so made at the time of the taking thereof, or notice thereof given to the other party before the trial is commenced, they will be taken to have been waived, and cannot be made at the trial. This has long been the practice, and it is said that this rule of practice is required by the general principles of practice, in the absence of any adopted rule to that effect, so as to prevent parties from being taken by surprise during the progress of a trial, and for the furtherance of justice.[5]

There is no positive provision requiring objections to substance, that is on account of incompetency or irrelevancy to be made before the trial, and hence objections on that account may be made for the first time at the trial when the depositions are read. It is true that the code requires that upon motion of either party, the court shall hear and determine questions arising on exceptions to depositions before the commencement of the trial,[6] but that refers to objections to the form, there being very good reasons for getting all questions relating to the form out of the way before trial, as it may throw the depositions out

[1] R. S., sec. 5282.

[2] Straw *v.* Dye, 2 W. L. M. 388. A motion to suppress depositions because not filed within the time fixed, but two terms of court elapsed after they were filed before the case was called, was overruled in Tuthill Spring Co. *v* Smith, 57 N. W. 853; 90 Ia. 331.

[3] R. S., sec. 5284.

[4] R. S., sec. 5285.

[5] Crowell *v.* Bank, 3 O. S. 406; Ash *v.* Marlow, 20 O. 119, 127; Cowan *v.* Ladd, 2 O. S. 322.

[6] R. S., sec. 5286.

entirely. I submit, however, that it would be a convenient rule of practice to make all objections, whether to form or substance, at the same time, and have them all determined at the same time ; it would keep the record in better shape. What questions relate to form and what to substance, belong to the substantive law of evidence, but for the purpose of making a practical application thereof, some points will be noted.

First those relating to form, objections to which must be made before trial. An objection to the notice of the taking of the deposition,[1] or because a question is leading in its form,[2] or that the depositions were not sealed up, directed and certified according to law,[3] or that the question assumes the existence of facts which must be proved, or which call for a conclusion of fact or law which is for the jury or court respectively.

Sec. 493. Exceptions must be decided before trial.—The court shall, on motion of either party, hear and decide questions arising on exceptions to depositions before the commencement of the trial.[4]

Sec. 494. Objections waived, when.—Errors of court, in its decisions upon exceptions to depositions, are waived unless excepted to.[5]

Sec. 495. Form of exceptions.—Now comes A. B., the plaintiff [*or*, defendant] in the above entitled action and excepts to the depositions of C. D., &c., filed herein and taken on behalf of the defendant upon the following grounds, to-wit: [*State the grounds of exceptions.*]

The plaintiff [*or*, defendant] therefore asks that said deposition be suppressed for the reasons herein stated, and that a hearing be hereon before the commencement of the trial of said cause.

E. B., *Attorney, &c.*

[1] Ash *v.* Marlow, 20 Ohio, 119, 128.
[2] Crowell *v.* Bank, 3 O. S. 406, 409.
[3] Bank *v.* Street, 16 O. S. 1.
[4] R. S., sec. 5286.
[5] R. S., sec. 5287.

CHAPTER XXV.

ADMISSION AND INSPECTION OF DOCUMENTS.

SEC.
496. Request to admit the genuineness of a paper and form.
497. Party may be compelled to produce books and writings.
498. Procedure in case of failure to produce books.
499. Right to inspection and copy of books and documents.
500. Form of demand for inspection and copy.
501. Procedure when demand for inspection and copy not complied with.
502. Notice of motion for order to produce books or papers for inspection.
503. Form of motion for order to compel inspection and copy when demand has not been complied with.
504. Appointment of master to inspect books and papers.
505. Form of motion for appointment of master.
506. How copies of written instruments obtained.

SEC. 496. Request to admit the genuineness of a paper and form.—Either party may exhibit to the other, or to his attorney, at any time before the trial, any paper or document material to the action, and request an admission in writing of its genuineness; and if the adverse party, or his attorney, fail to give the admission in writing within four days after the request, and if the party exhibiting the paper or document be afterwards put to any cost or expense to prove its genuineness, and the same be finally proved or admitted on the trial, such cost and expense to be ascertained at the trial, shall be paid by the party refusing to make the admission unless it appear, to the satisfaction of the court, that there were good reasons for the refusal.[1]

The form of written request to admit the genuineness of paper or writing may be as follows:

In the Court of Common Pleas of —— County, Ohio.

A. B., *Plaintiff*,
v.
C. D., *Defendant*.

The plaintiff herewith exhibits to you, as the attorney of C. D., the defendant herein, a certain promissory note with all indorsements thereon, upon which this action is founded, which said note purports to have been signed by the said defendant C. D., on the —— day of ——, 19—, and requests that the said defendant admit in writing the genuineness of said promissory note on or before the —— day of ——, 19—. If said

[1] R. S., sec. 5288.

defendant fails to admit in writing within four days after said note is exhibited to him, you are hereby notified that the plaintiff will not be put to any cost or any expense to prove its genuineness, and if the same be finally proved or admitted on trial, the cost and expense of proving the same shall be paid by the said defendant.

Sec. 497. Party may be compelled to produce books and writings.—It frequently occurs that one party to an action is in possession of certain books, papers, or writings which contain evidence material to the issue favorable to the party who is not in possession thereof. It is important to know whether a party is or is not willing that all the facts shall be known to the jury, or whether he has or has not attempted to suppress important evidence in a cause.

Before the adoption of the code the courts of chancery were possessed of a power to compel the production of such documents for inspection of either party, and this has been incorporated into the code. It is provided that: The court in which the action is pending may, on motion, and on reasonable notice thereof, require the parties to produce books and writings in their possession, or power, which contain evidence pertinent to the issue, in cases and under circumstances where they might heretofore have been compelled to produce the same by the ordinary rules of proceeding in chancery.[1] The fact that this means of compelling an unwilling party to furnish evidence under his control, does not prevent an inference from being drawn from an attempt or refusal on the part of such person to furnish the facilities at his command for a fair and full investigation of the facts in the case.[2] It will be noticed that the code provides that there shall be reasonable notice given of a motion to produce books, and as the whole procedure appears to rest somewhat within the discretion of the court[3] what shall be a reasonable notice in a given case, is probably within the discretion of the court. It is said, however, that where the defendant has from the nature of the action, notice that the plaintiff intends charging him with the possession of documents, that formal notice to produce the same is not essential as a foundation for the introduction of parol testimony touching its contents.[4] So where plaintiff's right of action is created by statute and depends upon the fact of written notice served, without proof of which no recovery could possibly be had, the mere fact of bringing the

[1] R. S., sec. 5289.

[2] Lockwood *v.* Rose, 125 Ind. 588.

[3] 33 Barb. 650; 25 How. Pr. Rep. 522.

[4] Railway Co. *v.* Cronin, 38 O. S. 122; 2 Greenl. on Ev., sec. 561; 2 Phil. on Ev., 539, and cases cited.

suit may be sufficient notice to the defendant that it would be necessary to introduce the written notice, which is in the possession of the defendant.[1]

There are certain rules to be observed in proceedings under this section. The procedure is by motion. This motion should clearly show that the book or paper is in the hands of the party against whom the order for its production and inspection is sought, and should specify clearly and definitely the particular paper desired, as well as its contents, to enable the court to determine its relevancy; this, of course, should be done with only reasonable certainty.[2] An order can hardly be made upon a motion of this character upon the bare, unsupported statements contained therein, but should be supported by evidence in the form of affidavits, or such evidence as may be conveniently secured. It is not necessary that a strong case be made out, although a groundless suspicion is not enough, nor is it necessary that the evidence to support the motion be such as will prove the plaintiff's case.[3] The degree of proof to be attained must rest with the court. An order to inspect, or produce, books or papers, should not be made in such terms as to license the party obtaining it to search the books and papers of his adversary at pleasure.[4]

This section of the code necessarily contemplates that the motion for the production of books should be made before the trial, and this is the general rule.[5]

Sec. 498. Procedure in case of failure to produce books.—The code has provided a specific remedy for the enforcement of an order made for the production and inspection of documents by providing that if the plaintiff fail to comply with such order to produce books or writings, the court may, on motion, give judgment for the defendant as in case of non-suit; and if a defendant fail to comply with such order to produce books or writings, the court may, on motion, give judgment against him by default.[6] It will be remembered that the power conferred by this provision is limited by the ordinary rules of proceeding in chancery in like cases and circumstances, and it is necessary, therefore, to know what the procedure formerly was in chancery. It is said that as a general rule in chancery practice the plaintiff must be able to read from the answer or affidavit, an

[1] Railway Co. *v.* Cronin, 38 O. S. 122.

[2] Silvers *v.* Railroad Co., 17 Ind. 142; Whitman *v.* Weller, 39 Ind. 515; Insurance Co. *v.* Pierce, 7 Hun, 236; Spencer *v.* Woolen, 42 Ind. 364.

[3] Nixon *v.* Chatfield, 2 C. S. C. R. 76.

[4] Whitman *v.* Weller, 39 Ind. 515.

[5] Choteau *v.* Riatt, 20 Oh. 132; and it must be an extraordinary case where a motion to produce a paper, given during the progress of the trial, can be held to be reasonable. *Id.*

[6] R. S., sec. 5289.

admission that the documents, for which the motion is made, is in the possession of the adversary at the time.[1] In some cases where the order to produce books has not been complied with, the party seeking the same may be permitted to introduce parol evidence as to the contents of the books or papers desired.[2]

Sec. 499. Right to inspection and copy of books and documents.—The code also gives either party, or his attorney, a right to demand of the adverse party an inspection and copy, or permission to take a copy of a book, paper, or document in his possession, or under his control, containing evidence relating to the merits of the action or defense. This demand must be made in writing, and must specify the book, paper, or document, with sufficient particularity to enable the other party to distinguish it.[3]

Sec. 500. Form of demand for inspection and copy.—

In the Court of Common Pleas, of —— County, Ohio.

A. B., *Plaintiff*,
v.
C. D., *Defendant*.

To C. D., Defendant:

You are hereby notified that A. B., the plaintiff in the above entitled action, demands that he shall be permitted to inspect and copy certain books and papers in your possession (or under your control) containing evidence relating to the merits of the above action, which said books and papers are described as follows:

[*Here give description with sufficient particularity to enable the other party to distinguish it.*]

If you fail to comply with this notice within four days, the plaintiff will make a motion to the court for an order upon you to give an inspection and copy of such books.

E. B., *Attorney for Plaintiff.*[4]

Sec. 501. Procedure when demand for inspection and copy not complied with.—If the demand for the inspection and copy of books or papers in the possession of an adversary be not complied with by him, the parties seeking such inspection and copy may make a motion to the court, or judge, after having given notice to the adverse party, for an order requiring him to give,

[1] Baggott *v.* Goodwin, 17 O. S. 76, 82, and cases cited.

[2] Daugherty *v.* Schlotman, 1 C. S. C. R. 292, 298.

[3] R. S., sec. 5290.

[4] This notice should be served by copy as notices are ordinarily served.

within a time specified, an inspection and copy, or permission to take a copy of such book, paper or document. If such adverse party fails to comply with such order the court may exclude the paper or document from being given in evidence, or, if wanted as evidence by the party applying, may direct the jury to presume it to be such as the party, by affidavit, alleges it to be.

This section should not be construd to prevent a party from compelling another to produce any book, paper or document, when he is examined as a witness.[1]

The code does not specify the length of time for which notice shall be given, and this must therefore rest within the discretion of the court. The party giving it, therefore, will take care to give what may be considered a reasonable notice, under the circumstances, in his particular case.

Sec. 502. Notice of motion for order to produce books or papers for inspection.—

[*Caption.*]

The defendant is hereby notified that on the ——— day or ———, 19—, at ——— —. M., or as soon thereafter as counsel can be heard, the plaintiff will, at the court room of the court of ——— in the city of ———, move said court for an order requiring the defendant to produce in court for the inspection of the plaintiff, and to be used in evidence on the trial of said cause, the following [books and] papers, to wit: [*describe them particularly*], [and that the plaintiff be allowed to take copies thereof].

Dated ———, 19—.

I. T., *Attorney for Plaintiff.*

[*Acknowledgment of service.*]

Sec. 503. Form of motion for order to compel inspection and copy when demand has not been complied with.—

In the Court of Common Pleas of ——— County, Ohio.

A. B., *Plaintiff,*
v.
C. D., *Defendant.*
} *Motion to require inspection and copy.*

Now comes the plaintiff in the above entitled action and represents to the court that on the ——— day of ———, 19—, he served upon the defendant a demand in writing for an inspection and copy or permission to take a copy of the following described books, papers and documents, in his possession (or under his control), which said books, papers and documents

[1] R. S., sec. 5290.

contain evidence relating to the merits of this action and are described as follows: [*Description as in written demand.*]

Plaintiff further represents that in said written demand he requested the right to inspect and copy said books within four days from the date of the service of such motion, to-wit: by the ——— day of ———, 19—, but that said defendant has failed and refused to grant plaintiff such permission within that time, and said plaintiff therefore moves the court for an order granting him the right, within a time to be fixed by the court, to inspect and copy said books, or for permission to take a copy of such books, or papers, and for such order as may appear just and proper.[1]

E. B., *Attorney for Plaintiff.*

Sec. 504. Appointment of master to inspect books and papers.— If a party in possession of any book, paper, writing, or document allege that the same, or any part thereof, is of mere private interest, or of such character that it ought not to be produced, or an inspection or copy thereof allowed to be taken, the court may, on motion of either party, direct a private examination thereof by the master. If the master finds that such book, paper, writing or document contains matter pertinent to the case, and proper to be produced, inspected or copied, he shall report the same to the court, or a copy of such part as he finds pertinent to the case and proper to be produced, inspected or copied, and the book, paper, writing, or document, or part thereof so reported shall be admitted in evidence on the trial unless excluded by the court for proper cause.[2]

Sec. 505. Form of motion for appointment of master.—

In the Court of Common Pleas, ——— County, Ohio.

A. B., *Plaintiff,*
v.
C. D., *Defendant.*
} *Motion for appointment of master to make examination of books.*

Now comes the defendant in the above entitled action and represents to the court that the books, papers and documents sought to be inspected and copied as mentioned and set forth in the motion of the plaintiff herein for an order granting the right to such inspection and copy, are in the possession of this defendant, but that the same are of mere private interest, and of such character that the same ought not to be produced, or an inspection or copy thereof allowed or taken. Said books papers and documents are described as follows: [*Description.*

[1] For journal entry ordering inspection and copy, see Kinkead's Entries, No. 918.

[2] R. S., sec. 5291.

The defendant therefore moves the court for an order appointing a master, directing him to make a private examination of said books, papers and documents, and report the results of such examinations to the court in accordance with law.[1]

Sec. 506. How copies of written instruments obtained.—Either party, or his attorney, shall, if required, deliver to the other party, or his attorney, a copy of any instrument in writing whereon the action or defense is founded, or which he intends to offer in evidence at the trial; and if the plaintiff or defendant refuse to furnish the copy required, the party so refusing shall not be permitted to give in evidence at the trial, the original, of which a copy has been refused.[2]

The demand for copies of instruments of writing under this section should be made by a formal request in writing as follows:

In the Court of Common Pleas of Franklin County, Ohio.

A. B., *Plaintiff,*
v.
C. D., *Defendant.*

To E. F., Attorney for Plaintiff:

You are hereby requested to deliver to me as the attorney of C. D., defendant in the above entitled action, in accordance with Sec. 5292 of the code, a copy of any instrument of writing upon which this action was founded as well as all instruments which you intend to offer in evidence in behalf of the plaintiff at the trial of this cause, under the penalty that if you refuse to comply with this request you shall not be permitted to give the same in evidence at the trial.

G. H., *Attorney for Plaintiff.*

[1] For journal entry granting the above, see Kinkead's Entries, No. 919.

[2] This section does not apply to paper attached to and filed with a pleading in accordance with section 5085 of the code. R. S., sec. 5292. See Kinkead's Code Pldg., sec. 57.

CHAPTER XXVI.

COMPETENCY OF WITNESSES.

SEC.
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518. When party shall not testify.
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520. Party must be "adverse"—real and necessary, not formal and unnecessary.
521. Who are not adversely interested—Statute not applicable when.
522. Same, continued—When guardian is adverse party.
523. Same, continued—When administrator is adverse party.
524. When statute does not apply—And party may testify.
525. Same—Exception—Facts occurring subsequent to appointment or death.
526. Same—Exception—When action relates to contract made through agent.
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528. Same—Exception—Evidence of conversations or admissions of opposite party.
529. Same—Exception—Actions against partner or joint contractor.
530. Same—Exception—When claim or defense founded on book account.
531. Same—Exception—Evidence of witness who has died after testifying.
532. Same—Exception—Deposition of witness after death.
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535. Principles of exceptions applied to cases within the spirit.
536. Same, continued—Extent of its application.
537. Cross-examination of party.
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540. Competency of witnesses in criminal cases.
541. Witness bound to disclose his connection with offenses against game and liquor laws.
542. The defendant as a witness in a criminal case.
543. An accomplice or joint defendant may testify when.

SEC. 507. Purpose of this chapter is to collate the various rules of evidence bearing upon the competency of witnesses for the State of Ohio, for convenient and ready reference, the aim being to accomplish this result by the method of arrangement. It is thought that it will be useful to have all rules of "trial evidence" brought together with the subject-matter of this book.

Sec. 508. Law governing competency of witnesses must be that which is in force at the time the trial takes place, as amendments in this particular relate to the remedy, and cannot, therefore, affect the rights of parties to actions either civil or criminal.[1]

Sec. 509. Who are competent witnesses—Civil cases.—The code provides that: All persons are competent witnesses, except those of unsound mind, and children under ten years of age who appear incapable of receiving just impressions of the facts and transactions respecting which they are examined, or of relating them truly.[2] This removed the disqualification of witnesses on account of interest and conviction of crime, and was intended to apply only in civil causes,[3] there being a special statutory enactment having special reference to criminal causes covering the same ground.[4] The several provisions relating to the competency of witnesses,[5] privileged communications,[6] who shall not testify,[7] touching one subject, are to be construed together and treated as a single statute, so that all its provisions may harmonize.[8] All persons without regard to their religious belief are competent witnesses,[9] and may be punished for false swearing.[10] A witness cannot be rendered incompetent on account of his religious belief, and it is said that one believing in the existence of a supreme being may be sworn as a witness,[11] but we do not believe that one who does not so believe is disqualified, and such a person may be sworn, compelled to testify and punished for perjury. A deaf person is not incompetent by reason thereof, and may be examined by signs through the instrumentality of an interpreter who can make him understand.[12]

Sec. 510. Husband and wife may testify for or against each other, when.—The common-law rules of evidence rendered husband and wife incompetent to testify for or against each other, either in criminal or in civil matters. The code and the amendments which have been added from time to time, it is said, regulate the whole subject of the competency of witnesses in civil cases.[13] And the same may be said of the criminal code. The civil and criminal codes of procedure, it is well under-

[1] Westerman *v.* Westerman, 25 O. S. 500; John *v.* Bridgman, 27 O. S. 22
[2] Whittaker's Civ. Code, sec. 5240.
[3] Steen *v.* State, 20 O. S. 333.
[4] R. S., sec. 7284
[5] Sec. 5240.
[6] Sec. 5241.
[7] Sec. 5242.
[8] Roberts *v.* Briscoe, 44 O. S. 596, 600.
[9] Const., Art. 1. sec. 7.
[10] Clinton *v.* State, 33 O. S. 27.
[11] Clinton *v* State. 33 O. S. 27.
[12] Jacob *v.* Jacob, W. 631.
[13] Howard *v.* Brower, 37 O. S. 402, 409.

stood, are not considered in the same light; there can be nothing done in criminal procedure that is not specially provided for, while such may not be the case in civil matters.

It is specially provided in both civil and criminal procedure that husband and wife are not permitted to testify concerning any communication made by one to the other or act done by either in the presence of each during coverture unless the communication was made or act done in the known presence or hearing of a third person competent to be a witness; and the rule is the same though the marital relation has ceased to exist.[1] As to civil matters, it has been decided under the civil code of Ohio that husband and wife are competent witnesses for and against each other, except as to communications made by one to the other, and acts done by one in the presence of the other during coverture, and not in the known presence of a third person.[2] The statute (5240) makes all persons competent witnesses excepting certain persons mentioned therein, and husband and wife are not mentioned, and in criminal procedure, until the statute was amended so as to allow husband or wife to testify on behalf of each other, they could not do so.[3] From a very early date an exception was declared to exist in cases of personal injury inflicted by the one upon the other This exception is said to have arisen from necessity because of the mischief which would follow from the exclusion.[4] This exception is now incorporated in the code.[5] And though they are now by statute made competent witnesses in behalf of each other, they cannot be compelled to testify to the matters which are privileged.

The older rule that husband or wife may not testify for or against each other, and the rule now incorporated in our statutes, that they may not testify concerning communications which are made privileged, is said to rest upon considerations of public policy, and in the interest of the marital relation. Public policy requires that they be not allowed to betray the trust and confidence which are essential to the happiness of the marital state.[6] Hence the one cannot testify without the consent of the other.[7] In criminal cases the husband or wife cannot be called by the State to testify against each other and on behalf of the State, but if they take advantage of the privilege and either does become a witness in behalf of the other, he or she

[1] R. S., secs. 5241, 7284.

[2] Westerman *v.* Westerman, 25 O. S. 500; Howard *v.* Brower, 37 O. S. 403; Bean *v.* Green, 33 O. S. 444.

[3] Schultz *v.* State, 32 O. S. 276. See Thurman *v.* State, 4 O. C. C. 141, 145.

[4] Whipp *v.* State, 34 O. S. 37.

[5] R. S., sec. 7284.

[6] Greenleaf's Ev., sec. 254; Sessions *v.* Trevitt, 39 O. S. 259.

[7] Steen *v.* State, 20 O. S. 333; 32 O. S. 276; 8 O. C. C. 262.

then becomes a competent witness like any other, excepting as to privileged communications.[1]

The competency of such third person, who is present during communications, must relate to the time of the making of the communications or the doing of the acts, and not at the time of the trial,[2] and testimony as to such communications is not rendered incompetent even though the third person in whose presence they were made is dead, as death of such person does not affect the non-secrecy of such communications.[3]

Sec. 511. Meaning of the excluded "communications."—The communications between husband and wife sought to be excluded by the statute, include oral and written communications, as the definition of "communications is intercourse by means of words, letters, or messages."[4] But a letter written by a wife to her husband and by him wilfully shown or given to a third person, could not be considered privileged.[5] But it has been held in Ohio that where a wife is living separate from her husband and with her parents, and the question is whether she is there by the wrong of the husband or the parents, in an action by the husband against the parents, letters written by the wife during such separation, in which she addresses him as her "dear husband," are competent to show the condition of her feelings towards him, and are not within the statute.[6] In the latter case the letters were used only for a special purpose, and it is not believed that under the Ohio decisions and statute, a letter written by either husband or wife to the other could be considered in any other light than privileged. But if a communication in writing which is privileged gets into the hands of third persons, no matter how, it loses its privileged character.[7]

Sec. 512. Whether statute applies, to be decided upon voir doir.—The question whether or not communications or acts fall within the statute, or whether or not a third person was present at the time of the communication or doing of the act, who is competent to testify, so as to remove the bar of the statute, must be first submitted to and be determined by the court upon a preliminary examination.[8] And if the question be brought before a reviewing court where it is claimed that the communications were improperly received in evidence the general rule is

[1] Haberty *v.* State, 8 O. C. C. 262.

[2] 4 W. L. B. 213.

[3] Sessions *v.* Trevitt, 39 O. S. 259; Morgan *v.* Bartlette, 3 O. C. C. 431; Sieving *v.* Seidelmeyer, 4 W. L. B. 213.

[4] Wilkerson *v.* State, 91 Ga. 729 (a letter); Scott *v.* Commonwealth, 94 Ky. 511. See Greenl. Ev.(15th ed.), sec. 254.

[5] People *v.* Hays, 140 N. Y. 484; s. c. 37 Am. St. 572, and extended note.

[6] Holz *v.* Dick, 42 O. S. 23.

[7] State *v.* Buffington, 20 Kan. 599. *Contra*, Scott *v.* Com., 94 Ky. 511; s. c. 42 Am. St. 371, and see monographic note in 29 Am. St. Rep. 411.

[8] Westerman *v.* Westerman, 25 O. S. 500.

that the court of error will presume that satisfactory evidence was produced to the court that such competent third person was present.[1] But this would be an unnatural presumption in some cases, and hence would not always prevail. The presumption would arise that in some cases a third person would not likely be present.[2]

Sec. 513. Testimony of attorney concerning communications made by client.—An attorney cannot testify concerning communications made to him by his client in that relation, or as to advice given by him to his client, unless his client expressly consents that he may do so. If, however, the client voluntarily testifies to such communications or advice then the attorney may be compelled to testify to the same subject,[3] as the client by voluntarily offering himself as a witness generally in his own behalf, thereby loses and waives his privilege or protection which the law would otherwise have afforded to communications made by him to his attorney, and consents to the examination of his attorney, and the latter may on cross-examination be interrogated concerning communications made to his counsel, and they may be proved by the attorney either as evidence in chief, or by way of impeachment.[4] An accused, however, in a criminal case by going on the stand himself cannot on cross-examination be compelled to disclose confidential communications between himself and counsel; nor can such disclosures be required of the attorney without the consent of the accused.[5] Ordinarily this privilege extends to none but regularly admitted attorneys, though it has been so extended as to embrace communications passing between one accused of crime and one who has for many years practiced before magistrates, and whose aid and counsel have been sought as an attorney or counselor, even though he has not been regularly admitted.[6] The privilege has been held to extend to a prosecuting attorney,[7] where the prosecutrix in a prosecution for seduction makes statements to the prosecuting officer, such communication not being deprived of its privileged character by the fact that her mother was present and participated in the consultation.[8] It is well established that the privilege extends as well to communications to or through an agent, as to those made directly to an attorney by the client in person.[9] The privilege extends not only to the

[1] Westerman *v.* Westerman, 25 O. S. 507.

[2] Commercial Gazette *v.* Groome, 21 W. L. B. 292.

[3] Whittaker's Civ. Code, sec. 5241.

[4] King *v.* Barrett, 11 O. S. 261; Berry *v.* State, 31 O. S. 219, 230.

[5] Duttenhofer *v.* State, 34 O. S. 91.

[6] Benedict *v.* State, 44 O. S. 679. See State *v.* Burkhardt, 3 W. L. B. 845.

[7] Vogel *v.* Gruez, 11 W. L. B. 130.

[8] Bowers *v.* State, 29 O. S. 542.

[9] Bowers *v.* State, *supra.*

attorney but also to an attorney's agent or clerk.[1] But it does not extend to a law student in an attorney's office who is not his clerk, or to a mere scrivener.[2] An agent or an interpreter who is acting for and on behalf of an attorney occupies exactly the same position as does the attorney himself.[3] Where there is a third person present during a conversation between an attorney and his client, there is not the same obligation of secrecy on the part of the former, and the communication, under such circumstances, is not privileged.[4] So if a third person happens to be present,[5] and casually overhears the conversation, the same is not privileged.[6] And so it is if the attorney derives his knowledge in some other way than through his client, in which case he may be compelled to testify.[7] The privilege only extends, of course, when the relation of attorney and client is properly sustained, when the client makes the communication on the faith of the relation, and when he in good faith seeks the advice of the attorney.[8] Of course the privilege is only a privilege, and may be waived by the client. The attorney cannot testify so long as the client objects and claims the benefit of the privilege. If the client testifies and gives evidence generally in a case, then the attorney may be compelled to testify with reference to the subject-matter of the communication.[9] This rule has no application to criminal procedure, as the privilege is not waived by the accused going upon the witness stand, and when he becomes a witness in his own behalf he cannot be compelled on cross-examination to disclose confidential communications between himself and his attorney.[10] After one has gone to his grave the living are not permitted to drag to light communications and disclosures made under the seal of the statutes.[11]

Sec. 514. Communications between physician and patient.— A physician cannot testify to any communication made to him by his patient in that relation, or his advice to his patient, unless

[1] Whittaker's Code of Ev., p. 527, and cases; 1 Greenl. Ev., sec. 239; Sibley *v.* Waffle, 6 N. Y. 180; Hames *v.* State, 88 Ala. 68.

[2] Dierstein *v.* Schubkagel, 131 Pa. St. 53; 24 W. L. B. 292; Barnes *v.* Harris, 7 Cush. 576; 1 Greenl. Ev., sec. 239; DeWolf *v.* Strader, 26 Ill. 225; Brown *v.* Fouts, 15 Ind. 50; Coon *v.* Swan, 30 Vt. 6 (a scrivener).

[3] Jackson *v.* French, 3 Wend. 337; Andrews *v.* Solomon, Pet. C. C. 356; Parker *v.* Carter, 4 Munf. 273 (Interpreters); Parkins *v.* Hawkshaw, 2 Stark, 213; Bunbury *v.* Bunbury, 2 Beav. 173.

[4] Greer *v.* Greer, 12 N. Y. Supp. 778; *In re* Smith's Will, 15 N. Y. Supp. 425.

[5] Goddard *v.* Gardner, 28 Conn. 178.

[6] Hoy *v.* Morris, 13 Gray, 519.

[7] Rogers *v.* Dare, W. 136; Patten *v.* Moor, 9 Foster, 163. See Whittaker's Code of Ev., p. 529, for further phases of the question.

[8] Whittaker's Code of Ev., 528.

[9] King *v.* Barrett, 11 O. S. 261; Stoppel *v.* Woolner, 4 W. L. B. 576.

[10] Duttenhofer *v.* State, 34 O. S. 91.

[11] Westover *v.* Life Insurance Co., 99 N. Y. 56.

the patient consents thereto. If, however, the patient voluntarily testifies, the physician may be compelled to testify on the same subject.[1] A statement of a physician, however, to be privileged, must be made to a person reasonably and properly entitled to receive the same in the ordinary course of his professional business.[2] It has been held that the same rule prevails in the case of a medical student as law student, and that the privilege does not extend to communications made to a medical student in a physician's office.[3] Substantially the same rules of law govern communications made to physicians as to attorneys. They must be for lawful purposes, so that communications taking place with reference to the procurement of abortion could not be privileged.[4] So it is a privilege extended solely by statute to the patient, but he may waive it.[5] Information obtained before the professional relations commence are not privileged.[6]

Sec. 515. Communications made to minister.—A clergyman or priest cannot testify concerning a confession made to him in his professional character in the course of discipline enjoined by the church to which he belongs.[7] A clergyman, however, is a competent witness against a defendant charged with a crime, as to any confession thereof by the latter, not made in the course of discipline enjoined by the church.[8]

Sec. 516. Assignee of claim cannot testify when.—The statute forbids a person who assigns his claim or interest, to testify concerning any matter in respect to which he would not, if a party, be permitted to testify.[9] In an action by an indorsee of a promissory note against the maker, the executor of the maker may compel the payee and assignor of the note to testify to facts that occurred prior to the death of the testator.[10]

Sec. 517. Where property is sold by executor, &c.—A person who, if a party would be restricted in his evidence under Sec. 5242 shall, where the property or thing is sold or transferred by an executor, administrator, guardian, trustee, heir, devisee, or legatee, be restricted in the same manner in any action or proceeding concerning such property or thing.[11]

[1] Whittaker's Civ. Code, sec. 5241.
[2] Alpin *v.* Morton, 21 O. S. 536; Lewis *v.* Chapman, 16 N. Y. 374.
[3] Kendall *v.* Gray, 2 Hilt. 300.
[4] Hewitt *v.* Prime, 21 Wend. 79.
[5] See more particularly Whittaker's Ev., p. 533.
[6] Fisher *v.* Fisher, 129 N. Y. 654; *In re* Loewenstone Estate, 21 N. Y. 931.
[7] Whittaker's Civ. Code, sec. 5241.
[8] Gillooley *v.* State, 58 Ind. 182.
[9] Whittaker's Civ. Code, sec. 5241.
[10] Roberts *v.* Briscoe, 44 O. S. 596.
[11] Whittaker's Civ. Code, sec. 5241.

Sec. 518. When party shall not testify.—The common-law rules of evidence prohibited parties to the record in civil actions from testifying. The code of evidence provided that personal interest in the event of a suit did not disqualify a party as a witness,[1] but does provide when a party shall not testify under certain conditions, viz: where the adverse party is the guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee, of a deceased person,[2] except under certain conditions or exceptions named or specified in the statute, which are taken up separately in the succeeding sections.

Sec. 519. Same, continued—Scope and purpose of the statute.—In several cases the supreme court has discussed the object or purpose of the statute. Peck, J., said, after a number of changes had been made, in speaking of the section: "The section has been revised, altered and modified several times by the legislature, and it would be going too far for us, on its assumed propriety, to add a disqualification to those already specified."[3] The statute at first was construed strictly, which resulted in the addition of the clause that when a case is within the reason and spirit of the several sections, though not within the strict letter, their principles shall be applied. It now must be liberally construed.[4] The scope and purpose of the statute is to provide for mutuality. As each party is competent against the other, that purpose is subserved.[5] The statute is in the nature of a provision against frauds and perjuries. The testimony of a party to a suit is now competent, but is excluded by this statute when it relates to transactions between him and deceased persons, against whose estate he asserts a claim. It was considered that there would be a temptation, in such a case, to fraud and perjury, against which protection should be given by excluding the testimony.[6] The manifest policy of the statute forbids that the evidence of the party living should be received while the mouth of the deceased is closed. The statute being remedial in its nature, is entitled to a liberal construction.

Sec. 520. Party must be "adverse"—real and necessary, not formal and unnecessary.—The parties intended to be excluded from testifying by this statute are the *real*, and not mere *formal*,

[1] Lawson *v.* Bank, 1 O. S. 206.

[2] Code, sec. 5242.

[3] Bomberger *v.* Turner, 13 O. S. 263, 269.

[4] Cochran *v.* Almack, 39 O. S. 314, 319.

[5] Sternberger *v.* Hanna, 42 O. S 305, 308.

[6] Stevens *v.* Hartley, 13 O. S. 525, 531.

nominal, and wholly *unnecessary* parties. The statute only prohibits a party from testifying where the *adverse* party sustains certa n relations or characters, or comes within certain specified descriptions. The statute has reference to the adverse character which the parties sustain toward each other, as parties to the action at the time of the trial, and not necessarily to their relation as parties to the transaction which is the subject of the action or defense.[1] Even though a party has been made a party to a suit, when not necessarily so, the statute will not apply;[2] the statute does not contemplate parties in their mere nominal status on opposite sides as a party plaintiff or defendant, but adverse in interest and not wholly unnecessary as a party.[3] Whether a party can be permitted to testify cannot depend alone, therefore, upon the fact that they are parties to the record, nor as stated upon their position upon the record, but rather upon their real interest, and his relations as determined by his interests in the subject-matter of the controversy.[4] Whether parties are adverse to each other or not, depends upon the antagonism or identity of their interests.[5] In an action by the heirs in favor of or against the personal representatives, if any of them are offered as witnesses, the law will presume them to be interested until the contrary appears.[6]

Sec. 521. Who are not adversely interested—Statute not applicable when.—In an action to obtain title to land, by correcting a mistake in a deed under which both parties claim, the grantor, having no interest in the controversy, is not rendered incompetent as a witness, though the party against whom he is called upon to testify claims title, and defends as heir.[7] And where a grantee who holds title to lands in trust for the grantor, without the knowledge of the grantor conveys the lands to another upon the same trust, in an action by the grantor against the heirs of the second grantee to enforce the trust, upon which he took the legal title, the first grantee is not a necessary party and is a competent witness for the first grantor against the heirs of the second grantee to establish the trust.[8]

Sec. 522. Same, continued—When guardian is adverse party.—A party cannot testify, unless under one of the exceptions named

[1] Wolf *v.* Powner, 30 O. S. 472. They must be adversely interested in the determination of the issues. Hubbell *v.* Hubbell, 22 O. S. 208; Ryan *v.* O'Connor, 41 O. S. 368, 371.

[2] Williams *v.* Longley, 3 O. C. C. 510.

[3] Baker *v.* Kellogg, 29 O. S. 663; Brinker *v.* Schreiber, 9 W. L. B. 294.

[4] Allen *v.* Miller, 11 O. S. 374, 378; Hubbell *v.* Hubbell, 22 O S. 208, 221.

[5] Wolf *v.* Powner, 30 O. S. 472, 476; Allen *v.* Miller, 11 O. S. 374.

[6] Fagin *v.* Cooley, 17 O. 44.

[7] Thompson *v.* Thompson, 18 O. S. 73.

[8] Ryan *v.* O'Connor, 41 O. S. 368.

in the statute, where the adverse party is the guardian or trustee of either a deaf or dumb or an insane person, or of an imbecile, or of a child of a deceased person.[1] In an action by a guardian of an imbecile to set aside a deed executed by his ward before his appointment, the heirs of the grantees being defendants are disqualified to testify as to facts which occurred previous to the appointment of the guardian.[2]

Sec. 523. Same, continued—When administrator adverse party.—A party cannot testify where the adverse party is an executor or administrator unless he comes within one of the exceptions.[3] Under this provision it has been held that in an action by one executor or administrator against another, neither is competent to testify against the other to any matter not within one of the exceptions named in the statute.[4] In the settlement of an administrator's account, on exceptions filed, the administrator is a competent witness for either party.[5] And in an action by an administrator upon a promissory note made by two parties defendant, where only one of them sets up a defense, the other is a competent witness for his co-defendant.[6] In an action by a judgment creditor against heirs, where the administrator is not made a party, he is of course a competent witness to prove fraudulent collusion between himself and the deceased alienee.[7]

Sec. 524. When statute does not apply, and party may testify.—There are eight exceptions named in the statute when a party may testify, notwithstanding the adverse party is the guardian or trustee of either a deaf and dumb or an insane person, or of a child of a deceased person, or is an executor or administrator, or claims or defends as heir, grantee, assignee, devisee, or legatee, of a deceased person. These exceptions are taken up separately in the order named in the statute.

Sec. 525. Same, exception—Facts occurring subsequent to appointment or death.—The first exception to the provision prohibiting parties to the record from testifying[8] is as to facts which occurred subsequent to the appointment of the guardian or trustee of an insane person, and, in the other cases, subsequent to the time the decedent, grantor, assignor or testator died.[9]

[1] Code, sec. 5242. As to imbecile. Ross *v.* Todd, 4 O. C. C. 1.
[2] McNicol *v.* Johnson, 29 O. S. 85.
[3] Code, sec 5242.
[4] Farley *v.* Lisey, 55 O. S. 627.
[5] *In re* Rabbs' Estate, 16 O. S. 273, 274.
[6] Baker *v.* Kellogg, 29 O. S. 663.
[7] Bomberger *v.* Turner, 13 O. S. 263.
[8] *Ante*, sec. 518.
[9] Whittaker's Civ. Code, sec. 5242.

Sec. 526. Same, exception—When action relates to contract made through agent.—When the action or proceeding relates to a contract made through an agent by a person since deceased, and the agent is competent to testify as a witness, a party may testify on the same subject.[1] The testimony of such agent if a party himself, is subject to the same tests of competency as other parties, and if he is adverse in interest to one who claims or defends as devisee of such deceased person, he cannot testify either to his own agency or to the alleged contract.[2]

Sec. 527. Same, exception—When party in interest testifies.—If a party, or one having a direct interest, testify to the transactions or conversations with another party, the latter may testify as to the same transactions or conversations.[3] A widow of an intestate is not a necessary party to an action brought against the administrator of an estate, and if made a party she is not one in such sense as to entitle the plaintiff to testify, if she testifies to matters occurring before the death of the intestate.[4] If an administrator in his own behalf testifies to conversations between himself and intestate and the opposite party, the opposite party may testify to the same conversation.[5]

Sec. 528. Same, exceptions—Evidence of conversations or admissions of opposite party.—If a party to a suit offer evidence of conversations or admissions of the opposite party, the latter may testify concerning the same conversations or admissions.[6] The conversations which a party may testify means oral statements and not written ones.[7]

Sec. 529. Same, exception—Actions against partner or joint contractor.—In an action or proceeding by or against a partner or joint contractor, the adverse party shall not testify to transactions with, or admissions by, a partner or joint contractor since deceased, unless the same were made in the presence of the surviving partner or joint contractor; and this rule shall be applied without regard to the character in which the parties sue or are sued.[8] An adverse party to an action brought by a surviving partner is not a competent witness to testify to the transactions which took place, or conversations had by a deceased partner concerning the partnership business, in the

[1] Whittaker's Civ. Code, sec. 5242.
[2] Roberts *v.* Remy, 56 O. S. 249.
[3] Whittaker's Civ. Code, sec. 5242.
[4] Williams *v.* Longley, 3 O. C. C. 508.
[5] Rankin *v.* Hannan, 38 O. S. 438.
[6] Whittaker's Civ. Code, sec. 5242.
[7] Jackson *v.* Ely, 57 O. S. 450.
[8] Whittaker's Civ. Code, sec 5242.

absence of the surviving partner.[1] But in an action upon a promissory note when the survivor of one of two joint payees and the administrator of the other are plaintiffs, the adverse party may testify to admissions made or acts done by either payee in the presence of the survivor.[2]

Sec. 530. Same, exception—When claim or defense founded on book account.—If the claim or defense is founded on a book account, a party may testify that the book is his account book; that it is a book of original entries; that the entries therein were made by himself, a person deceased, or a disinterested person, non-resident of the county; whereupon the book shall be competent evidence, and such book may be admitted in evidence in any case, without regard to parties, upon like proof by any competent witness.[3] The testimony in regard to books of account is subject to the same rules of evidence as any other fact. The books are not received as conclusive evidence, but may be weakened or strengthened by other evidence. It may be shown whether or not they were fairly kept, or whether the party who kept them was a competent person. It may be shown that the books are notoriously unworthy of confidence, and particular acts may be shown for this purpose. The reputation of the books in the neighborhood among those having occasion to deal with the keeper of the books may be shown.[4] An account book of original entries is admissible in evidence in favor of the party by whom it was kept, when shown to be accurately kept; or that it was kept in the usual course of business.[5] It may be introduced as part of the *res gestæ* where the book-keeper testifies that they were correctly kept,[6] or may be used to refresh one's memory.[7] They will serve the purpose of evidence of the non-payment of a claim where no credit appears thereon,[8] but cannot be received to negative the payment of cash items,[9] nor are they evidence in favor of a merchant as to receipt of money by him.[10]

An account book is not admissible in evidence unless a preliminary foundation has been laid for its admission either as a book of original entries or as part of the *res gestæ*.[11]

[1] Baxter *v.* Leith, 28 O. S. 84.

[2] Harrison *v.* Neely, 41 O. S. 334.

[3] Whittaker's Civ. Code, sec. 5242.

[4] Sheridan *v.* Tenner, 5 O. C. C. 19, 20; Cram *v.* Spear, 8 Ohio, 494; 1 Smith Lead Cases, p. 601; Vosburgh *v.* Thayer, 12 John 461.

[5] Anchor Milling Co. *v.* Walsh, 108 Mo. 277.

[6] Muckle *v.* Rennie, 16 N. Y. Supp. 208.

[7] Lester *v.* Thompson, 91 Mich. 245.

[8] Union School Furn. Co. *v.* Mason, 5 S. D. 147; 52 N. W. 671.

[9] Schwarze *v.* Roesler, 40 Ill. App. 474.

[10] Oberg *v.* Breen, 50 N. J. L. 145.

[11] Watrons *v.* Cunningham, 71 Cal. 30.

Sec. 531. Same, exception—Evidence of witness who has died after testifying.—If a party, after testifying orally, die, or is beyond the jurisdiction or cannot be found, or is insane or appears to have been kept away by the adverse party, the evidence may be proved by either party on a further trial of the case, whereupon the opposite party may testify to the same matters.[1] Such testimony may be shown by a bill of exceptions, or by his own evidence as taken by an official stenographer.[2] This is an exception to the rule excluding hearsay evidence, and is applicable to both civil and criminal causes, without in the latter case doing violence to the constitutional requirement that the accused shall be allowed to meet the witnesses face to face. The general rules of evidence are usually the same in both civil and criminal cases.[3] This right of the accused has always prevailed at common law and under the constitutional form of governments has been well guarded, but it does not relate to the subject-matter or competency of testimony.[4] The limitations placed upon the right to introduce this class of evidence, are that the witness called must have heard the witness, whose testimony he undertakes to give, testify on the former trial, that he has such an accurate recollection of the testimony that he will upon oath undertake to narrate the substance of the matter testified to by the deceased witness, and that the deceased witness gave his evidence under oath.[5]

Sec. 532. Same, exception—Deposition of witness after death.—If a party die, and his deposition be offered in evidence, the opposite party may testify as to all competent matters therein.[6] The deposition of a witness in a former action is admissible in a subsequent action between the same parties involving the same subject-matter, where the witness has since died.[7] In a suit by or against an administrator, it is not competent for him to prove upon the trial what his intestate testified to on a former trial of the same action. The evidence of the intestate can only be received through the medium of a deposition, in which case in accordance with the statute, the adverse party is permitted to testify to facts which occurred during the life of the intestate.[8]

Sec. 533. Testimony in actions for death by wrongful act.—The provision of the code prohibiting parties to the record from testifying where the adverse party is guardian of a minor, or

[1] Whittaker's Civ. Code, secs. 5242, 5242*a*.
[2] *Id.*
[3] Summons *v.* State, 5 O. S. 325.
[4] *Id.*
[5] Summons *v.* State, *supra*
[6] Whittaker's Civ. Code, sec. 5242.
[7] Radclyffe *v.* Barton, 161 Mass. 327; 37 N. E. Rep. 373.
[8] Hoover *v.* Jennings, 11 O. S. 624.

administrator of an intestate, has no application to actions for causing death.[1]

Sec. 534. Actions involving validity of deed or will.—The section excluding parties from testifying when the adverse party is a guardian or trustee, or is an executor or administrator, or claims or defends as an heir, grantee, assignee, devisee, or legatee of a deceased person has no application to actions or proceedings involving the validity of a deed, will or codicil.[2] An action by an administrator to avoid a fraudulent conveyance by his intestate falls within this provision, and the grantee is a competent witness to testify generally.[3] The heirs, grantees and legatees who are declared competent witnesses by this proviso, are such as derive title from the same person. If a person does not claim under a will or deed, he must, to come within this section, claim as heir of the testator or grantor whose will or deed is sought to be set aside.[4] The widow of a deceased grantee is a competent witness to prove the execution and delivery of a deed claimed to have been made to her husband, in an action to recover possession to which she is not a party.[5] Nor is a grantor having no interest in a controversy in a suit to obtain title to land, by correcting a mistake in a deed under which both parties claim, rendered incompetent as a witness, though the party against whom he is called upon to testify, claims title and defends as heir.[6] A grantee holding legal title to lands in trust for the grantor, is a competent witness in a suit to enforce the trust against the heirs of a second grantee to whom he had conveyed the property upon the same trust.[7] An action by the executors of a grantee who had conveyed lands to a son in trust for himself, against the latter for its enforcement, is not within this exception, and the son, the adverse party, is incompetent to testify to matters occurring before the death of his father.[8]

Sec. 535. Principles of exceptions applied to cases within the spirit.—When a case is plainly within the reason and spirit of the last three sections, though not within the strict letter, their principles shall apply.[9] The reason and spirit of the exceptions to the rule of exclusion of section 5242 is in favor of admitting, not excluding, the living party, where the opposite party is

[1] Whittaker's Civ. Code, sec. 5242. See Hall *v.* Crain, 3 W. L. M. 137.

[2] Whittaker's Civ. Code, sec. 5242; Murdock *v.* McNeely, 1 O. C. C. 16, 17.

[3] Doney *v.* Administrator, 8 O. C. 163.

[4] Mosher *v.* Butler, 31 O. S. 188.

[5] Keyes *v.* Gore, 42 O. S. 211.

[6] Thompson *v.* Thompson, 18 O. S. 73.

[7] Ryan *v.* O'Connor, 41 O. S. 368.

[8] Paddock *v.* Adams, 56 O. S. 242.

[9] Whittaker's Civ. Code, sec. 5242.

claiming or defending in the right of a deceased person, and some act or admission of the living party is relied on against him, or in analogous cases, an exception is made in favor of the living party as to such transaction or admission so as to place him on an equality. A defendant is a competent witness to transactions with a deceased agent of a plaintiff, though not occurring in his presence, if within the scope of the agent's authority.[1] The omission of agents in those who are excluded was evidently intentional. To so construe the last clause of paragraph 8, section 5242, as to add agents to the enumerated classes would be judicial legislation.[2]

An agent of a vendor who makes a sale of goods for his principal, is not rendered incompetent to testify as a witness to the circumstances of the transaction because of the decease of the vendee.[3]

Sec. 536. Same, continued—Extent of its application.—This provision has no application to an alienor in a suit by his judgment creditor against him and the heirs of his alienee, who is a competent witness to prove fraudulent collusion between himself and the deceased alienee;[4] nor to a grantor not a party or having any interest in the controversy,[5] nor to a grantee holding legal title in trust for the grantor who conveys the same to another upon the same trust, but without the knowledge of the grantor, but may be permitted to testify in an action by the grantor to enforce the trust;[6] nor to a party in default for answer,[7] nor to the husband of an heir, who is joined as a party.[8] The heirs, legatees and grantees within this proviso are such as derive title from the same person.[9]

As parties to a suit are not incompetent to testify where the adverse party is the trustee of a deceased person only as provided by the statute, no objection can, therefore, be made until it is ascertained what the testimony is within its terms, and if it is forbidden it may then be excluded.[10] It has been held that where there are two or more persons, plaintiffs or defendants, claiming several interests under the same title or alleged state of facts, and the adverse party is a competent witness as against one or more of them, and incompetent as against the others, and the case is one in which separate judgments may be rendered, the testimony of such party should be received in evidence, and

[1] Cochran *v.* Almack, 39 O. S. 314.

[2] Cochran *v.* Almack, *supra;* Sternberger *v.* Hanna, 42 O. S. 305; Bank *v.* Cornell, 41 O. S. 401.

[3] Schaub *v.* Smith, 50 O. S. 648.

[4] Bomberger *v.* Turner, 13 O. S. 263

[5] Thompson *v.* Thompson, 18 O. S. 73.

[6] Ryan *v.* O'Connor, 41 O. S. 368.

[7] Baker *v.* Kellogg, 29 O. S. 663; 9 W. L. B. 294; Bell *v.* Wilson, 17 O. S. 640.

[8] Wolf *v.* Powner, 30 O. S. 472.

[9] Mosher *v.* Butler, 31 O. S. 188.

[10] Murdock *v.* McNeely, 1 O. C. C. 16, 17.

used and considered only as against those as to whom the witness was competent.[1]

Sec. 537. Cross-examination of party.—A party may be examined as if under cross-examination, at the instance of the adverse party, either orally or by deposition, as any other witness; the party calling for such examination is not concluded thereby, but may rebut it by other counter-testimony.[2]

Sec. 538. How laws of other States proved.—Printed copies of written law enacted by any other State, territory, or foreign government, purporting or proved to have been published by the authority thereof, or proved to be commonly admitted as evidence of the existing law in the courts or tribunals of such State, territory, or government, shall be admitted by the courts of this State, on all occasions, as presumptive evidence of such law; the unwritten or common law of any other State, or of a territory, or foreign government, may be proved as facts by parol evidence, and the books of reports of cases adjudicated in their courts may also be admitted as presumptive evidence of such law.[3] Judicial notice cannot be taken of the statutes of another country or State,[4] and their existence, as well as any peculiar construction which the courts of such country or State may have placed upon them by their decisions, must be proved as matters of fact.[5] The laws of another State must be pleaded and if not set forth with sufficient fullness objection may be taken by motion to correct the insufficiency.[6]

Sec. 539. How copies of certain public documents made competent evidence.—The statute makes copies of papers, books and records, on file or deposited, by virtue of any law, in the office of the governor or secretary of State, and certified by the secretary of State, or in the office of the board of public works, certified by the president of the board, or in the office of the auditor of State, certified by him under his seal, or in the office of the surveyor of lands lying within the Virginia military district, certified and sworn to by him, and copies of entries, surveys, and plats of lands in the Virginia military district procured to be made by the commissioners of any county, and

[1] Hubbell *v.* Hubbell, 22 O. S. 208, 226.

[2] Whittaker's Civ. Code, sec. 5343.

[3] Whittaker's Civ. Code, sec. 5244.

[4] Evans *v.* Reynolds, 32 O. S. 163.

[5] Ingraham *v.* Hart, 11 O. S. 255; Smith *v.* Bartram, 11 O. S. 690; Pelton *v.* Platner, 13 O. 209; Evans *v.* Reynolds, 32 O. S. 163; Bank *v.* Baker, 15 O. S. 68; Larwell *v.* Savings Fund Society, 49 O. S. 274; Whelms Exr. *v.* Kinsley's Admr., 26 O. S. 131; Williams *v.* Finley, 49 O. S. 342; Alexander *v.* Penn. Co., 48 O. S. 623.

[6] Williams *v.* Finley, 40 O. S. 342; Barr *v.* Closterman, 2 O. C. C. 387.

deposited with the recorder of such county, and certified by him, and the copies of such entries, surveys and plats, now in the office of the auditor of Union county, and copies of any books, maps, records, papers or documents on file or deposited in any of the executive departments of the United States government, authenticated under the seal of such department, shall be competent evidence, and have the same force and effect as the originals would if produced.[1] Copies of leases of surplus water of canals are within this provision, and when properly certified by the president of the board of public works are competent evidence.[2] Copies from the files from the office of the auditor of State, may be admitted only where the originals would be competent.[3]

Sec. 540. Competency of witnesses in criminal cases.—No person shall be disqualified as a witness in any criminal prosecution by reason of his interest in the event of the same, as a party or otherwise, or by reason of his conviction of any crime.[4] Where two persons are jointly indicted and separate trials are awarded them, each is a competent witness against the other;[5] but the declarations of one tending to establish the guilt of the one on trial are not competent evidence unless it appears with reasonable certainty that the same were heard by the accused on trial.[6] A witness is not bound to answer any question that will directly or indirectly criminate himself, and he has the right to determine for himself whether his answer will have that effect.[7]

Sec. 541. Witness bound to disclose his connection with offenses against game and liquor laws.—The criminal statutes offer a premium to a witness who will disclose any fact tending to criminate himself under the game laws so as to secure the conviction of another, by discharging him from all liability to prosecution or punishment. A person to whom intoxicating liquor has been sold in violation of law is a competent witness to prove such fact, or any other fact tending thereto.[8]

Sec. 542. The defendant as a witness in criminal case.—On the trial of all indictments, complaints, and other proceedings, against a person charged with the commission of an offense, the person so charged shall at his own request, but not otherwise,

[1] Whittaker's Civ. Code, sec. 5245.
[2] Emmitt *v.* Lee, 31 W. L. B. 3.
[3] State *v.* Wells, 11 O. 261, 262.
[4] R. S., sec. 7284. As to husband and wife, see *ante*, sec. 510.
[5] Brown *v.* State, 18 O. S. 496.
[6] Aidt *v.* State, 2. O. C. C. 18.
[7] Warner *v.* Lucas, 10 O. 337.
[8] R. S., sec. 7285.

be a competent witness ; but his neglect or refusal to testify shall not create any presumption against him, nor shall any reference be made to, nor any comment be made upon, such neglect or refusal.[1] An accused who becomes a witness in his own behalf subjects himself to the same rules and to the same tests as to his credibility as other witnesses.[2] He cannot, however, be compelled to disclose confidential communications between himself and attorney.[3] If the accused, after having been properly cautioned, makes a confession while testifying, the same may be used against him on a subsequent trial.[4] The greatest care should be exercised by the court to see that the statute as to comments upon the fact that the accused has not himself testified is carried out according to the letter and spirit. And the court should be prompt and diligent in rebuking and punishing, if necessary, any wilful infraction of it, though every violation may not warrant granting a new trial.[5] A rule prevails to some extent which allows the court to instruct the jury that in considering the defendant's testimony they may take into consideration the fact that he is defendant and his interest in the result of the case.[6]

Sec. 543. An accomplice or joint defendant may testify, when, on a separate trial against his co-defendant, even though not acquitted himself.[7] If an accomplice fully understands his privilege but gives testimony tending to criminate himself, he cannot refuse to give further testimony. He cannot withhold certain facts and state only such as he desires.[8] The court must charge the jury as to the weight to be given the testimony of an accomplice.

[1] R. S., sec. 7286.

[2] Hanoff *v.* State, 37 O. S. 178; Brandon *v.* People, 42 N. Y. 265.

[3] Duttenhofer *v.* State, 34 O. S. 91.

[4] Jackson *v.* State, 39 O. S. 37.

[5] Calkins *v.* State. 18 O. S. 366, 372; Schneider *v.* State, 2 O. C. C. 420, 439.

[6] State *v.* Ihrig, 196 Mo, 267; State *v.* Sanders, 106 Mo. 188; State *v.* Noeninger, 18 S. W. 990.

[7] Brown *v.* State, 18 Ohio St. 496, 509; Carroll *v.* State, 5 Neb. 31; Allen *v.* State, 10 O. S. 288. See Tullis *v.* State, 39 O. S. 200.

[8] Commonwealth *v.* Price, 10 Gray, 472.

CHAPTER XXVII.

CONDUCT OF THE TRIAL.

EMBRACING VARIOUS STEPS FROM IMPANELING THE JURY TO ARGUMENTS OF COUNSEL, DELIVERY OF EVIDENCE, EXAMINATION OF WITNESSES, DEGREES OF EVIDENCE.

I.

SEC.

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547. Permitting additional counsel to come in during progress of trial.
548. Excusing witnesses without consent of court.
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SSC.

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SEC. 544. This chapter is entitled "Conduct of Trial," the purpose being to treat of only such parts of the trial, however, as seem appropriate to be considered together in one head and chapter. Some (1) miscellaneous matters and (2) the delivery of evidence will be considered.

SEC. 545. The opening statement.—When the jury is impaneled and sworn the plaintiff in civil cases "must briefly state his claim, and may briefly state the evidence by which he expects to sustain it. The defendant must then briefly state his defense and also briefly state the evidence he expects to offer in support of it."[1] In criminal cases "counsel for the State must state the case of the prosecution, and may briefly state the evidence by which he expects to sustain it. The defendant or his counsel must then state his defense, and may briefly state the evidence he expects to offer in support of it."[2]

A few practical suggestions may not be inappropriate here. The purpose of an opening statement is to state briefly the nature of the action, the substance of the pleadings, the points in issue, the facts and circumstances of the case, and the substance of the evidence to be adduced in its support,[3] "to put the jury in a position to understand and apply the evidence delivered."[4] One of the principal objects of the opening state-

[1] R. S., sec. 5190.
[2] R. S., sec. 7300.
[3] Ayrault *v.* Chamberlain, 33 Barb. 229.
[4] Bishop's Cr. Pr., sec. 969.

ment is to guard against surprise and deception. A full and fair statement of the case should be made and of the facts which are expected to be proven. It is not proper to read at length documentary evidence intended to be placed in evidence,[1] nor are counsel confined in the introduction of evidence to the statement which he makes in his opening.[2] It has been held not to be an abuse of discretion to allow counsel to state that he expects to prove certain matters which would be incompetent evidence.[3] But it is beyond question the better practice to keep within the legal bounds of evidence in stating what it is expected to prove as well as when offering evidence.[4] And where there has been a change of venue, upon the motion of either side, it is not improper to state that fact in the opening statement.[5] And in some jurisdictions counsel are permitted to state at length both the law and facts, though this does not seem to be proper practice.[6] It has also been held that where plaintiff's counsel states and admits facts which must necessarily preclude a recovery, the court may at once arrest proceedings and render judgment accordingly.[7]

It is not proper for counsel to make a lengthy argument of all the minute details of the case, but should content himself with only the salient points which he expects to prove,[8] and this should be done well.

As first impressions are oftentimes lasting, in the language of an eminent jurist and author: "It is, therefore, obvious that the statement of the case, both for the plaintiff and for the defendant, is a work requiring skill and power."[9] It is of the greatest importance that the jury be given a full and complete understanding of the case at the outset, so that they may not grope their way in the dark, forming possibly wrong impressions, and failing to see the full effect of many points until the case is half tried. Every point in the case should be outlined clearly in the language of counsel, and not in the language of the pleadings. Merely reading the pleading is hardly sufficient, as the jury are with such a statement apt to start out with confused ideas, and it then becomes more difficult to clear this confusion. If a clear, concise, logical and compact statement be made, the jury will then more readily see the purpose of testimony offered. A good opening statement, with the evidence to substantiate it, may more frequently serve a better purpose than a confused opening and a good address to the jury.

[1] Scripps *v.* Reilly, 35 Mich. 371, 388.

[2] Kelly *v.* Insurance Co., 3 Wis. 254.

[3] Campbell *v.* Kalamazoo, 80 Mich. 655; 45 N. W. 652.

[4] See Bishop's Cr. Pr., sec. 969.

[5] Vawter *v.* Hultz, 112 Mo. 633.

[6] Prentis *v.* Bates, 93 Mich. 234.

[7] Lindley *v.*, Railroad Co., 47 Kan. 432.

[8] Zucker *v.* Karpeles, 88 Mich. 413.

[9] Elliott's Gen. Pr., sec. 545.

Sec. 546. Cause must be tried according to established rules of procedure.—Adversary parties to a suit cannot by contract require the court to try their cause contrary to the established rules of judicial proceedings, and all contracts made to effect such a purpose are void absolutely.[1] In the conduct of a trial very many matters must rest in the discretion of the court of original jurisdiction. If a matter complained of infringes upon no rule of law, and merely affects the mode or manner of arriving at a determination, and not the rights or merits to be decided, it is generally considered a matter of practice within the discretion of the court, with which it would not be proper for a court of error to interfere. Upon a motion for a new trial, and upon a review of the action, upon that motion, of the court in which the case was tried, which is permitted by bill of exceptions and a proceeding in error, the range of action in reference to such matters is undoubtedly enlarged. But in such case it must appear that there has been an abuse of discretion, resulting in injustice. A difference of opinion as to the proper course of proceeding would not be sufficient; the appellate court must be able to say that the course pursued was not only improper, but that it operated unjustly and injuriously to the parties.[2]

Sec. 547. Permitting additional counsel to come in during progress of trial.—Whether or not the trial court may permit additional counsel to be taken into a case after it has begun or during its progress does not seem to have occupied the attention of the reviewing courts so far as reported adjudications disclose. This undoubtedly is controlled by the discretion of the court, and additional counsel may or may not be admitted according to the circumstances of the case. If it will be prejudicial to some material right of a party, then it should not be permitted, and if allowed under such circumstances it would be an abuse of discretion.[3] This may occur when either party would have had the right to challenge a juror had counsel been in the case at the beginning. If, therefore, taking in additional counsel will not in any manner interfere with any right of the other side, there can certainly be no objection.

Sec. 548. Excusing witnesses without consent of court.—Where a case is duly set for trial, and the parties are notified by the court that the witnesses must be examined on that day, and with knowledge of this the counsel for one of the parties, without consent of the court, excuses a part of the witnesses until

[1] Gittings *v.* Baker, 2 O. S. 21.
[2] Gandolfo *v.* State, 11 O. S. 114, 118.
[3] Israel *v.* Railroad Co., 19 W. L. B. 258.

the next day, though there was ample time to examine them on that day, but on account of the mistake of an officer, other witnesses of the party had not been summoned, and the court adjourned the trial until the next day, to hear those witnesses only, it was not error, or an abuse of discretion on the part of the trial judge to refuse to allow one of such excused witnesses to testify on the next day, even if consent had not been given thereto, which was done in this case.[1]

Sec. 549. Change in rules of evidence.—The trial is conducted according to the rules of evidence in force at the time of the trial, without regard to what it was when the action accrued or was commenced.[2]

Sec. 550. Suspension of trial to procure witnesses.—Where on the trial of a capital case, a witness attending court under a subpœna, on behalf of the State, departs without leave, after the trial has commenced, it is competent for the court to suspend the progress of the trial for the purpose of enforcing, by attachment, the attendance of such witness. The proper time to be allowed for such purpose must be determined by the sound discretion of the court, in view of all the circumstances of the case. Where there is no reason to believe that the defendant has been thereby prejudiced or deprived of a fair trial, a delay thus allowed by the court from time to time, to the extent of three days, will not necessarily invalidate the verdict subsequently rendered against the defendant, nor require the court to set the same aside.[3]

The court may also in a civil case hold a case open for the arrival of a witness who is unavoidably delayed, or allow counsel to call the witness on the following day without prejudicing the rights of the parties.[4] These matters are entirely within the discretion of the court.

Sec. 551. Separating or excluding witnesses.—The doctrine governing this matter, though simple and well understood, will be outlined in this section.

I.

1. *A rule of practice* prevails in England and America, in both civil and criminal cases, that a trial court may place witnesses under what is termed a "rule," requiring and directing

[1] Railroad Co. *v.* Barcalow, 4 O. C. C. 49.

[2] Westreman *v.* Westerman, 25 O. S. 500; John *v.* Brigman, 27 O. S. 22.

[3] Griffin *v.* State, 18 O. S. 438.

[4] Illinois Central R. Co. *v.* Slater, 28 N. E. 830; 139 Ill. 190.

them to be separated and excluded from the court-room so that one may not testify in the hearing of another.

2. *Its purpose* is to develop truth, detect and expose falsehood, and seems essential to the procurement of a fair and impartial trial.[1]

3. *Discretionary aud not a matter of right.*—The common-law rule of evidence and procedure confides to the judge a discretionary authority as to when the "rule" may be invoked and enforced. And so it is considered in the American States that the separation of witnesses in both civil and criminal cases, is not a matter of right, although it is rarely withheld.[2]

4. *Discretion not reviewable.*—Applying the common rule that discretion is not reviewable unless abused, courts have uniformly held that the action of the trial court cannot be revised in the absence of a showing of an abuse of discretion.[3] Where no special reason for a request is given, a reviewing court cannot say that the trial court so abused its discretion as to commit a material error by its refusal to grant the request.[4] There can be no abuse of discretion if an agent of a party familiar with his business remain in the court-room in the absence of the party to assist his counsel.[5] But where the witnesses for the State in a criminal prosecution listen at a door communicating with the court-room to hear other testimony, it has been held by a court of inferior jurisdiction that a new trial will be granted to the defendant unless it be shown that they did not hear the testimony.[6]

5. *Rule, how obtained.*—is usually secured by motion, but more generally by mere request. The respective parties are required to disclose the names of their witnesses intended to be examined, their names are called by the clerk, and the court orders them to withdraw from the court-room and warned not to return until called. Or they may be placed in charge of an officer of court to be kept by him out of hearing of the jury, and brought in as needed for examination.[7]

6. *Who are exempt from the rule.*—The rule cannot be extended to a party who has a constitutional right to be present,[8] nor to one of several joint defendants in a criminal case,[9] nor to

[1] Watts *v.* Holland, 56 Texas, 59; Hay *v.* Commonwealth, 32 Gratt. 946.

[2] Purnell *v.* Purnell, 89 N. C. 42; Zaldaske *v.* State, 82 Wis. 580; Watts *v.* Holland, 56 Tex. 59; People *v.* Garnett, 29 Cal. 622; People *v.* Lung, 70 Cal. 515; Powell *v.* State, 13 Tex. App. 244. But as to criminal cases, see Watts *v.* Holland, 56 Tex. 59.

[3] Powell *v.* State, 13 Tex. App. 244; Bishop's New Crim. Pro., sec. 1189.

[4] State *v.* Davis, 48 Kan. 1.

[5] Indianapolis Cab Co. *v* Herrman, 34 N. E. Rep. 579; 7 Ind. App. 462.

[6] State *v.* Ross, 15 W. L. B. 238.

[7] Hay *v.* Commonwealth, 32 Gratt. 946.

[8] Shew *v.* Hews, 126 Ind. 474; Ryan *v.* Couch, 66 Ala. 244; Schneider *v.* Haas, 14 Ore. 174.

[9] Richardson *v.* State, 30 Am. St. R. 907.

a party in interest in a civil case though not of record;[1] nor to medical or other experts,[2] nor to an agent who has such an intimate knowledge of the facts that his services are required by counsel in the management of the trial,[3] nor to a guardian of a minor defendant.[4]

7. *Effect of disobedience of the rule.*—Many courts have held that the only proper remedy for disobedience of the rule by a witness is punishment as for contempt, and the witness cannot be prevented from giving his testimony.[5] A *nisi prius* court in Ohio, however, has considered that when an order for separation has been purposely violated by witnesses, it affects a substantial right of the parties, and is such misconduct of the witnesses within the meaning of the statute prescribing grounds for new trial, as will warrant the court in granting a new trial.[6] And still it must be remembered that this matter rests with the discretion of the court.

8. *May the disobedient witness testify.*—Again, it is said that when the witness has violated the rule, and heard the testimony of other witnesses, it rests in the discretion of the court as to whether he shall be permitted to testify.[7] But it seems well settled from all the authorities, so far as Ohio is concerned, at least, and it is reasonable, that the court shall only be allowed to exercise any discretion as to this matter when there has been any connivance on the part of the party calling the witness.[8] Otherwise the witness should be allowed to testify, and if necessary for the preservation of the rules of practice, punish the witness as for contempt.[9] There are, however, many courts which maintain that it is discretionary with the court whether or not the testimony of the disobedient witness should be rejected.[10] But this is not the Ohio rule. When there has been no connivance or procurement by the party calling the witness, the witness must be permitted to testify.

[1] Chester *v.* Bower, 55 Cal. 46.

[2] Johnson *v.* State, 10 Tex. App 571; Commonwealth *v.* Hersey, 2 Allen, 173.

[3] Ryan *v.* Couch, 66 Ala. 244.

[4] Cottrell *v.* Cottrell, 81 Ind. 87.

[5] Chandler *v.* Horne, 2 Mood & Rob. 423; Cook *v.* Nethercote, 7 Car. & P. 743; Cobbett *v.* Hudson, 1 El. & Bl. 11; Hubbard *v.* Hubbard, 7 Ore. 47; State *v.* Thomas, 111 Ind. 515; Betts *v.* State, 66 Ga. 512; Parker *v.* State, 67 Md. 329; Lassiter *v.* State, 67 Ga. 739 The conduct of the witness may be shown to affect his credibility. Taylor *v.* State, 130 Ind. 66.

[6] State *v.* Ross, 15 W. L. B. 238. If a witness remains in violation of the order, it furnishes strong ground of suspicion that the witness is not fairly disposed in the cause. Laughlin *v.* State, 18 O. 99, 102.

[7] Laughlin *v.* State, 18 O. 99.

[8] Dickson *v.* State, 39 O. S. 73; Bond *v.* State, 50 Ga. 585.

[9] Dickson *v.* State, 39 O. S. 73; O'Bryan *v.* Allen, 95 Mo. 68; Hubbard *v.* Same, 7 Ore. 48; Hay *v.* Commonwealth, 32 Gratt. 946; Davenport *v.* Ogg, 15 Kan. 363; Bell *v.* State, 44 Ala. 393.

[10] Bishop's New Cr. Pro., sec. 1192.

Sec. 552. Limiting number of witnesses—Subject of legislation.—This subject has been considered an appropriate one for legislative enactment, and the legislative discretion relating thereto cannot be controlled by the judicial tribunals of the State, unless in some particular instance of its exercise the legislature transcends its constitutional powers. The legislature is vested with power to prescribe reasonable limits to the constitutional right of an accused to have compulsory process. A statute, therefore, limiting the number of witnesses who may be examined as to character and reputation on the trial of any criminal cause may be lawfully enacted.[1]

1. *The purpose of such legislation* is to prevent an abuse of the privilege of compulsory process, secured by the constitution, to secure the attendance of witnesses. If the accused be able and willing to pay for additional witnesses to his character or reputation, the statute does not deny them. The burden of paying for them is regarded as a sufficient guaranty that none not reasonably necessary will be subpœnaed.[2]

2. *As to character and reputation in criminal cases.*—The statute limits the number of witnesses to be called in such cases to ten, unless the payment of fees of those in excess of ten is provided for by the party calling them.[3]

3. *Discretion of the court in such cases.*—The statute being directory merely, the trial court may violate its express provisions according to its own discretion, and its action in refusing to enforce the statute in this respect is not subject to review on error. The trial court is answerable to its own conscience and sense of duty only,[4] unless it has grossly abused its discretion, when the reviewing court may then possibly interfere.[5]

4. *The rule in civil cases* is apparently not so well settled by uniformity of decision as to the power of the court to limit the number of witnesses who may be called to establish or prove the issue in a case. But there is reason in allowing the trial court to exercise reasonable discretion as to the number of witnesses who may be called to establish any particular or single fact involved in the issue, and such is the uniform rule.[6]

The court may very properly limit the number of experts to be called as witnesses,[7] and also in an action for slander charging

[1] State *v.* Stout, 49 O. S. 270; R. S., sec. 7287. See Browder *v.* State, 30 Tex. App. 614.

[2] State *v.* Stout, 49 O. S. 270, 279.

[3] R. S., sec. 7287.

[4] State *v.* Stout, 49 O. S. 270.

[5] Butler *v.* State, 97 Ind. 378.

[6] Hupp *v.* Boring, 8 O. C. C. 259; Detroit City Ry. *v.* Mills, 85 Mich. 634; Meier *v.* Morgan, 82 Wis. 289; Gray *v.* St. John, 35 Ill. 222; Thompson on Trials, sec. 353, and cases cited; Rapalje on Witnesses, sec. 234; 1 Phillips on Ev. 712; Everett *v.* Union Pacific R. Co., 59 Ia. 243.

[7] Hilliard *v.* Beattie, 59 N. H. 462. And so where called to give opinions. Huett *v.* Clark, 35 Pac. 671; 4 Col. App. 231.

plaintiff with the number of witnesses that should be introduced upon the question of the plaintiff's credibility may be limited.[1] The number of witnesses examined upon the same point may be limited.[2] But the court in prescribing a limitation cannot deprive a party of his right to testify,[3] nor under the rule above stated would it be proper in an action for slander charging dishonesty to limit the number of witnesses called upon the reputation of the plaintiff in that respect.[4]

5. *Waiver of objections.*—Where at the opening of the trial an order is made limiting the number of witnesses, to which there is no objection entered, it constitutes a waiver, and no complaint can thereafter be made. Objection should be made at the time and an exception taken.[5]

Sec. 553. Interruption of examination by adverse party.—It is very annoying and a bad practice to interfere by questions with the examination of witnesses by the adverse party, but as this falls within the discretion of the court, it will not be erroneous if it is not prejudicial to the party.[6]

Sec. 554. Counsel talking to witness on stand.—The court should not permit counsel to talk to the witness whom he is examining, and it is bad policy to even allow the witness to withdraw temporarily for consultation; the effect would be bad upon the jury.

II.

PRODUCTION, DELIVERY, AND ADMISSION OF EVIDENCE.

Sec. 555. Rules of evidence in civil and criminal cases.—The rules concerning the delivery, admission and rejection of evidence, upon which subject we are now entering, are substantially the same in civil and criminal cases.[7] There is a difference, however, upon the effect of proof, and as to the kinds of evidence essential in the two classes of actions. For example, in civil actions, as a general rule, there must be a preponderance of evidence, and in other civil actions clear and convincing proof is necessary, which is a higher grade of testimony. In criminal cases, human liberty being at stake, a greater degree of certainty is required, it being necessary that the guilt of an accused be proven beyond a reasonable doubt.

[1] R. S., sec. 6430.
[2] Bays *v.* Hunt, 60 Ia. 251.
[3] Fisher *v.* Conway, 21 Kan. 18.
[4] Ward *v.* Dick, 45 Conn. 235; 29 Am. Rep. 677.
[5] McConnell *v.* Osage, 80 Ia. 293.
[6] Schaal *v.* Heck, 17 O. C. C. 38.
[7] State *v.* Dart, 29 Conn. 153; 76 Am. Dec. 596; Commonwealth *v.* Abbott, 130 Mass. 472.

Sec. 556. Burden of proof in civil cases—General statement.—The code, following the general rule existing at common law as to which party must assume the burden of proof in civil cases, provides that: "The party who would be defeated if no evidence were offered on either side must first produce his evidence, and the adverse party must produce his evidence."[1] Again it is held that the general rule is that the burden of proof rests upon the party holding the affirmative, especially so where from the nature of the case, the facts alleged are personally within the knowledge of the party.[2] If the plaintiff holds the affirmative on one of several issues joined, he must first produce his evidence, and the meaning of the code provision resolves itself into this. If by the issues raised by the pleadings the plaintiff is placed in an affirmative position as to any issue which, if not supported by some evidence, judgment must be rendered against him, then he must assume the burden of proof.[3] A case may hardly arise in which the issues will be so raised that it will not be necessary for the plaintiff to introduce some evidence, however slight, at the beginning of the case. Then it may be that after he has made out a *prima facie* case, the burden shifts upon the defendant to establish the issues raised by his defense. But wherever the plaintiff is met by a general denial he must begin the evidence.[4] When by the pleadings it is apparent on account of record admissions that no evidence is required from the plaintiff, the burden is upon the defendant and he ought to begin. But if any, no matter how slight, proof is required of the plaintiff, he must go forward with his evidence.[5]

In determining upon whom rests the burden of proof in a difficult, intricate state of pleading, however, the court must be allowed some degree of discretion; in fact this discretion should be liberal, and should not be subject to be reviewed, unless upon a very plain case of abuse.[6] The terms "burden of proof" and "weight of evidence" are frequently confounded. The burden of proof is determined at the commencement of the trial by the pleadings, the burden of either party extending only to the allegations upon which he bases his case. When we speak of the burden of proof shifting, we really mean the weight of the evidence, though in point of fact the two are very different things. The

[1] The burden of proof lies on the party against whom the verdict ought to be given, if no evidence were given. Leete *v.* Life Insurance Co., 7 Eng. Law and Equity, 578; Huckman *v.* Fernie, 3 M. & W. 510.

[2] Ferguson *v.* Gilbert, 16 O. S. 88; Jones on Ev., sec. 179.

[3] Montgomery *v.* Swindler, 32 O. S. 224.

[4] Thompson on Trials, sec. 229.

[5] Lexington *v.* Paver, 16 O. 324, 330; Montgomery *v.* Swindler, 224, 226.

[6] Montgomery *v.* Swindler, 32 O. S. 224; Jones on Ev., sec. 177.

burden, after having been determined, does not change the progress of the trial. But the weight of the evidence shifts from side to side with "with the ebb and flow of the testimony."[1]

Sec. 557. Burden of proof in criminal cases.—The criminal code provides that: The State must first produce its evidence; and the defendant will then produce his evidence.[2] In all cases where a party stands charged with a crime, his innocence is presumed, and the burden of proof is, therefore, necessarily upon the prosecutor, unless a different rule is expressly provided by statute.[3] And this is, as we have seen, the rule of the code. The State must necessarily present a *prima facie* case against the defendant;[4] and indeed under a plea of not guilty the State must prove all of the essential elements of the offense charged. The presumption can only be overcome by full proof of guilt, such as excludes all reasonable doubt.[5] Says an eminent author: "Whatever the defendant brings forward in denial of the allegations, or of the proofs which the prosecution has adduced, the burden still remains on the State, and it never shifts to him."[6] But the rule is well settled that when the defendant sets up a plea that a homicide was justifiable, the burden of proving that it was excusable on the ground of self-defense rests on the defendant, and must be established by a preponderance of the evidence.[7] But so long as the defendant relies upon no separate, distinct and independent fact, but confines his defense to the original transaction on which the charge is founded, with its accompanying circumstances, the burden of proof, or weight of evidence, never shifts, but remains with the State throughout the whole case.[8] The burden of proof is not changed, therefore, when the defendant undertakes to prove an alibi,[9] or that a homicide was accidental.[10] But as the defense of insanity,[11] or self-defense,[12] has the effect of rebutting the criminal intent, the burden of proving such independent defenses rests on the defendant, which he must do by a preponderance of evidence merely, and not beyond a reasonable doubt.[13]

[1] Central Bridge Corporation *v.* Butler, 2 Gray, 132; Scott *v.* Wood, 81 Cal. 400; Willett *v.* Rich, 142 Mass. 356.

[2] R. S., 7300.

[3] Fuller *v.* State, 12 O. S. 434; United States *v.* Gooding, 12 Wheat. 460.

[4] Bishop's New Crim. Pro., sec. 1050.

[5] Fuller *v.* State, 12 O. S. 434.

[6] Bishop's New Crim. Pro., sec. 1049.

[7] Silvus *v.* State, 22 O. S. 90.

[8] Silvus *v.* State, 22 O. S. 90, 93; 1 Greenleaf's Ev., sec 74 note.

[9] Walters *v.* State, 39 O. S. 215. See Toler *v.* State, 16 O. S. 583.

[10] Jones *v.* State, 32 W. L. B. 241.

[11] Loeffner *v.* State, 10 O. S. 598; Bond *v.* State, 23 O. S. 349; Bergin *v.* State, 31 O. S. 111; Clark *v.* State, 12 Ohio, 483, 494.

[12] Weaver *v.* State, 24 O. S. 584; Turner *v.* State, 5 O. C. C. 537; Silvus *v.* State, 22 O. S. 90.

[13] *Id.*; Kelch *v.* State, 55 O. S. 146. Bradbury, J., in discussing this question, says: "The question of the burden

Sec. 558. Burden in action involving unliquidated damages.—In actions calling for unliquidated damages, such as personal injuries, libel and slander, malicious prosecutions, assault and battery, &c., the settled English and American practice is to impose the burden of proof upon the plaintiff.[1] Upon issues raised by a plea of justification, both reason and the weight of authority is that the plaintiff should begin and close.[2] The plaintiff in action for malicious prosecution must assume the burden of proving want of probable cause and he must show malice. The mere acquittal or discharge of the person is not sufficient.[3] But in an action for false imprisonment, a discharge from arrest makes a *prima facie* case, so as to throw the burden of proof upon the defendant to show probable cause.[4]

Sec. 559. Burden in actions on insurance policies.—The plaintiff in bringing an action on an insurance policy—life or fire—must aver and prove the performance of all the conditions required to be performed by him, according to the terms of the policy, before an action can be sustained.[5] As where the terms of a policy required that if other insurance were effected on the same risk, notice should be given by the insured to be indorsed on the policy, it is essential that, before a recovery can be had on the policy, the giving of such notice be proven.[6] Such a condition in a policy makes it the duty of the insured to comply with its terms, and it cannot be avoided except by clear proof of an express agreement to the contrary, or general usage. And the court will not reform a policy requiring an indorsement of the prior insurance upon the policy without such proof.[7]

Where receipt of the premium is acknowledged in the policy it devolves upon the company to show non-payment by clear and satisfactory testimony, especially where the insured has had

of proof, where insanity is set up as a defense in criminal causes, has been fruitful of discussion, and has occupied the attention of the ablest criminal jurists of this country, and of England. The contention has not so much concerned the degree of proof, as upon whom the burden rested. . . . In the practical administration of criminal law, however, experience has found much to commend . . that . . view which treats the defense of insanity as an independent and affirmative, and which consequently casts upon the accused who asserts it, the burden of sustaining it by evidence sufficient to overcome the natural presumption of sanity. . . . This doctrine has prevailed in Ohio from an early period in its judicial annals. Clark *v.* State, 12 O. S. 483; Bond *v.* State, 23 O. S. 349; Bergin *v.* State, 31 O. S. 111; Loeffner *v.* State, 10 O. S. 598; Kelch *v.* State, 55 O. S. 149.

[1] Dille *v.* Lovell, 37 O. S. 415, 417; 1 Greenleaf's Ev., sec. 76.

[2] Dille *v.* Lovell, 37 O. S. 415, 417; 1 Greenl. Ev., sec. 77; 1 Wharton's Ev., secs. 353, 357, 358; Page *v.* Osgood, 2 Gray, 260.

[3] John *v.* Bridgman, 27 O. S. 22.

[4] Rosenkranz *v.* Haas, 20 N. Y. Supp. 880.

[5] Harris *v.* Insurance Co., W. 550; Insurance Co. *v.* McMillen, 24 O. S. 67.

[6] Harris *v.* Insurance Co., W. 544.

[7] Fellows *v.* Insurance Co., 2 Disn. 128.

no notice, before loss, that non-payment would render the policy void.[1] But a receipt of this kind in a policy does not shut off inquiry as to the real state of facts. Although the burden of disproving it is placed upon the company, yet like all other admissions of the receipt of money it is subject to explanation, or may be controverted altogether. As where the insured gave a note in part payment of the premium, it was held that the relations of the underwriter and the insured were unchanged, and non-payment could be shown, notwithstanding the receipt in the policy.[2]

Where a policy provides that the company shall not be liable in case the insured shall die by his own hand, upon issue joined as to whether the death was within the exception, the burden of proof rests upon the company.[3]

In an action on a policy where it is alleged in the answer and denied in the reply, that certain assessments were regularly made upon the premium notes of the plaintiff, and payment thereof demanded and refused, it is not necessary for the plaintiff, in his evidence in chief, to disprove such allegations, although the petition avers full performance on his part of the terms of the contract.[4] If a mutual benefit company undertakes to assert a forfeiture of the rights of a member, the burden is upon it to prove the same, as a mere entry on its books that the member has been dropped is not sufficient evidence.[5]

Sec. 560. Burden in actions against common carriers.—Whenever a common carrier claims a contract restricting its liability, the burden is upon it to prove such agreement, as it cannot exempt its liability except by special stipulation.[6] Where a bill of lading contains an exception as to liability, the burden is upon the carrier to show, not only a loss within the exception, but also that it exercised proper care to prevent it,[7] as well as the assent of the shipper to the conditions or exception.[8]

Sec. 561. Burden in actions affecting municipal corporations.—A municipal corporation, to enforce an assessment, must show that it is authorized by law to do so; but any one claiming an exemption therefrom must assume the burden of substan-

[1] Lee *v.* Insurance Co., 1 Handy, 217.

[2] Robert *v.* Insurance Co., 2 Disn. 106, 113.

[3] Schultz *v.* Insurance Co., 40 O. S. 217.

[4] Insurance Co. *v.* Bowersox, 6 O. C. C. 1.

[5] Odd Fellows' Protective Asso. *v.* Hook, 10 W. L. B. 399.

[6] Railroad Co. *v.* Campbell, 36 O. S. 647, 658, and cases cited; Union Ex. Co. *v.* Graham, 26 O. S. 595.

[7] Graham *v.* Davis, 4 O. S. 362; Davidson *v.* Graham, 2 O. S. 132; Union Express Co. *v.* Graham, 26 O. S. 595; United S. Ex. Co. *v.* Backman, 28 O. S 144; Gains *v.* Transportation Co., 28 O. S. 418.

[8] Gaines *v.* Union Transp. Co., *supra;* Mack, &c. *v.* Gt. West. Dispatch Co., 3 O. C. C. 36.

tiating his claim.[1] Regularity of assessment proceedings of a city council is presumed, and the burden of proving irregularity or illegality of the same rests upon him who questions their validity.[2] And to enjoin a street assessment the burden is upon the plaintiff to show a clear right.[3] Where a city is sued for an illegal arrest the burden is upon it to prove that the officer making the arrest was justified in so doing.[4]

Sec. 562. Burden of proving contributory negligence.—Where there exists no relation between the plaintiff and defendant in an action for negligence which imposes a duty upon the person complaining of the injury toward the defendant, or where it cannot be implied from the facts and circumstances of the injury that plaintiff's own negligence contributed thereto, the burden of proving contributory negligence then rests upon the defendant.[5] And so is the burden upon the defendant where the circumstances require of plaintiff the exercise of due care to avoid injury, and his own testimony does not raise any implication of negligence on his part. But the burden rests on the plaintiff of removing a presumption of negligence which may arise from his own evidence.[6] When the relation from which the implication of negligence arises does not exist, and when the plaintiff's evidence does not raise the implication of contributory negligence, the burden of proving it is then always upon the defendant

Sec. 563. Burden in actions on notes.—A *prima facie* case is established when a note is produced and its execution is admitted or proved, and the plaintiff may not then be required to prove consideration, as that is presumed. This presumption continues until it is shown that there was none; and the burden of showing this is on the party attacking the note for want of consideration.[7] But where the defendant claims both want of consideration and wrongful transfer of the same by the payee, with the knowledge of the plaintiff that it was wrongful, upon want of consideration being shown, the burden is cast upon the plaintiff to show that he received the note for a good consideration.[8] The court will not compel a plaintiff to show considera-

[1] Lima *v.* Cemetery Asso., 42 O. 128.
[2] Tone *v.* Columbus, 1 O. C. C. 305.
[3] Spangler *v.* Cleveland, 43 O. S. 526.
[4] Reinhard *v.* City, 49 O. S. 257.
[5] Kinkead's Code Pleading, sec. 75–2, 915; Robinson *v.* Gary, 28 O. S. 241; Voss *v.* Young, 10 W. L. B. 292.
[6] Railroad Co. *v.* Whitacre, 35 O. S. 627; Robison *v.* Gary, 28 O. S. 241; Pendleton St. R. R. Co. *v.* Stallman, 22 O. S. 1; St. R. R. Co. *v.* Nolthenius, 40 O. S. 376; Meek *v.* Pennsylvania Co., 38 O. S. 632, 638; Davis *v.* Griffith, 27 W. L. B. 180.
[7] Langhorst *v.* Dolle, 5 W. L. B. 933; Kinkead's Code Plg. sec. 65–10, 65–11; Dalrymple *v.* Wyker, 60 O. S. 108; Davis *v.* Gray, 17 O. S. 330, 350.
[8] Davis *v.* Bartlett, 12 O. S. 534; Tod *v.* Wick, 36 O. S. 370, 390.

tion merely because suspicion has been cast upon the note by the evidence.[1] An answer by a defendant who is sued as a joint maker of a note that he is only an accommodation indorser, throws the burden upon the plaintiff.[2] Wherever it appears that a transfer of a note by the first holder was a positive fraud, the burden is upon the person claiming under such transaction to show that he acted honestly, without knowledge of the fraud.[3] A *bona fide* holder of a note before maturity, who endeavors to escape liability on the ground that the note was not voluntarily executed, must show that he was without negligence.[4]

Where a surety defends on the ground of an extension of time to the principal without the consent of the surety, the burden of proof is upon him.[5] But where the plaintiff admits such an extension, and sets up in reply a subsequent promise of the surety to pay if the principal does not, the burden is upon the creditor.[6]

Sec. 564. Burden of proof in contest of will.—In the trial of a contest of a will, the order of probate is *prima facie* evidence of the due attestation, execution and validity of the will.[7] The party sustaining the will shall be entitled to open and close the evidence; he may offer the will and rest; the opposite party shall then offer his evidence; the party sustaining the will shall then offer his other evidence, and rebutting testimony may be offered as in other cases.[8] The party sustaining the will offers the will, which may be some evidence, but the party who will lose in such a contest, if no such evidence is offered, is the contestant. The will will stand if evidence to show its invalidity be not offered by the contestant. The burden of proof is, therefore, on the contestant to invalidate the will.[9]

Sec. 565. Burden in the extraordinary remedies.—The burden of establishing a right to a perpetual injunction is necessarily upon the party asking it.[10] A person pursuing an extraordinary remedy, whether by an attachment or injunction, must show a clear right thereto.[11] When an affidavit for attachment is controverted or denied by the defendant, the burden is upon the plaintiff to substantiate by clear and satisfactory proof the

[1] Murphy *v.* Hagerman, W. 293.
[2] Parish *v.* Mears, 1 Handy, 492.
[3] McKesson *v.* Stanberry, 3 O. S. 156.
[4] Ross *v.* Doland, 29 O. S. 473, 479; Perkins *v.* White, 36 O. S. 530; DeCamp *v.* Hamma, 29 O. S. 467.
[5] Bramble *v.* Ward, 40 O. S. 267; Schmidt *v.* Cordes, 2 C. S. C. R. 294.
[6] Bramble *v.* Ward, 40 O. S. 267.
[7] R. S., sec. 5862.
[8] R. S., sec. 5864.
[9] Haynes *v.* Haynes, 33 O. S. 598; Mears *v.* Mears, 15 O. S. 90; Behrens *v.* Behrens, 47 O. S. 323, 329.
[10] Spangler *v.* Cleveland, 43 O. S. 526.
[11] Egan *v.* Lumsden, 2 Disney, 168, 174.

grounds alleged by him.[1] If the defendant undertakes to have the attachment discharged upon motion, the burden is upon him to show sufficient grounds for such action.[2] When the answer in mandamus sets up matters by way of justification, the burden of proving the same rests on the defendant.[3]

Sec. 566. When burden of proof is upon the defendant.—The right of opening or closing the evidence does not belong to either the plaintiff or defendant as such, but to the one holding the affirmative. If the defendant relies upon an independent fact as a defense he may introduce only enough evidence to constitute a *prima facie* defense, and in the close introduce evidence to rebut any matters which the plaintiff may have introduced to disprove his defense.[4]

Whenever he sets up new matter which casts the affirmative of the issue raised thereby upon him he must assume the burden of proving every material allegation made by him.[5] For example, the burden is upon him when he claims payment of a note,[6] or facts in mitigation,[7] or a contract of a different nature from that set up by plaintiff,[8] or when he seeks to have a contract construed to be a conditional sale,[9] or when he claims the benefit of an exception of the statute of limitations,[10] or when seeking to prove the statute of limitations of another State,[11] or when claiming adverse possession in ejectment,[12] or when charging *laches* on the part of an infant.[13]

Sec. 567. Reviewing action of court upon question of burden of proof.—It is incumbent upon the trial court to direct the jury in its charge upon whom the burden of proof rests, and a misdirection in this respect, when prejudicial to the party complaining, is error for which the judgment will be reversed.[14] It will not be considered error in overruling a motion for a new trial unless it appears that the jury might have rendered a different verdict if properly instructed.[15] The error, like all others, must be prejudicial.

[1] Coston *v.* Paige, 9 O. S. 397; Seville *v.* Wagner, 40 O. S. 52; Willinger *v.* *v.* Bramsche, 7 O. C. C. 208; Ry Co. *v.* City of Hamilton, 3 O. C. C. 455; Bacon Floto Co. *v.* Stove Co., 5 O. C. C. 290.

[2] Bank *v.* Nash, 1 Handy, 153.

[3] Case *v.* Wresler, 4 O. S. 561.

[4] Goss *v.* Turner, 21 Vt. 437.

[5] Schmidt *v.* Cordes, 2 C. S. C. R. 294.

[6] Fewster *v.* Goddard, 25 O. S. 276; Carrington *v.* Davis, W. 735.

[7] Carpenter *v.* Warner, 38 O. S. 416.

[8] Leisy *v.* Zuellig, 7 O. C. C. 423.

[9] Cotterell *v.* Long, 20 Ohio, 464, 473.

[10] Doe *v.* Gibson, 2 Ohio, 339.

[11] Whelan *v.* Kinsley, 26 O. S. 151. The burden of proving a bar of the statute rests on him who claims it. Bank *v.* McIntire, 40 O. S. 528, 539.

[12] Williams *v.* Burnet, W. 53.

[13] Long *v.* Mulford, 17 O. S. 485.

[14] McNutt *v.* Kaufman, 26 O. S. 127.

[15] Young *v.* Langdon, 12 W. L. B. 246

Sec. 568. Order of proof—Party in affirmative should introduce all his evidence.—The rules of evidence require that the party holding the affirmative of an issue must give all his evidence in support of the issue in the first instance. He is not permitted to reserve any portion of his evidence in chief for rebuttal.[1] When one holding the affirmative has concluded his testimony in chief, his adversary then introduces his proof, and then testimony in rebuttal is offered by the one holding the affirmative, and new evidence, or evidence of new facts first offered by a party in rebuttal, may afterwards be rebutted by his adversary.[2] Only such evidence may be offered in reply or rebuttal as will tend to answer or rebut the new matter introduced by his adversary.[3] Evidence in rebuttal is evidence in denial of some affirmation offered by the other party. Any relaxation of this rule is but an appeal to the discretion of the court, and is not subject to review upon error.[4] Having closed his evidence, and the opposite party having closed, it is entirely within the discretion of the court whether the party in the affirmative shall introduce further evidence not strictly in rebuttal or re-examine any of his witnesses.[4]

Sec. 569. Order of introducing proof discretionary.—In civil cases the law vests the court with discretion to change the order of proceeding on the trial, which may be exercised when there are special reasons therefor .[5] Under this provision the order in which testimony may be introduced is confided to the discretion of the court. This is not an arbitrary, but a legal and proper discretion, depending upon special reasons in a given case, and such course should be pursued as will not prejudice the rights of the parties.[6] It is said that the order of proof is a slight matter as compared with the question of its competency. If testimony offered is such that it ought to be submitted to the jury, the time or manner in which it is presented is of comparatively little moment. Only in extreme cases, therefore, will it be held that the manner or order of presenting competent testimony violates a substantial right of either party.[7] The order of proof being confided to the discretion of the court, the usual rule applies, and the action of the court in this matter will not be disturbed upon error unless it is shown that the party has

[1] Graham *v.* Davis, 4 O. S. 362.

[2] National Benefit Assc'n. *v.* Harding, 7 O. C. C. 438.

[3] Graham *v.* Davis, 4 O. S. 362; Marshal *v.* Davis, 78 N. Y. 414; 1 Greenleaf's Ev., sec. 74.

[4] Graham *v.* Davis, *supra.*

[4] Marshall *v.* Davis, *supra.*

[5] R. S., sec, 5190.

[6] Limerick *v.* State, 14 O. C. C. 207; Dille *v.* Lowell, 37 O. S. 415, 418; Shahan *v.* Swan, 48 O. S. 25, 33.

[7] Rheinhardt *v.* State, 14 Kan. 322; Blake *v.* Powell, 26 Kan. 320.

been prevented from having a fair trial.[1] It is said that the order of admission of proof may very properly be left to the court when the cause is tried to the court without a jury.[2] The discretion ordinarily conceded to counsel to pursue their own order in the production of proof so as to show its relevancy is limited to cases where the fact subsequently to be made relevant is itself established by competent testimony.[3]

The court may permit evidence to be given in reply which should properly have been given in chief.[4] When evidence has been admitted which, standing by itself, would be erroneous, the error may be cured by the subsequent admission of evidence supplying the defect.[5] Upon the trial of an action to enforce the specific performance of a parol contract to convey land, or an interest therein, it is not error to admit parol evidence of the terms of the contract, before proof of part performance has been made.[6] After the evidence on both sides has closed, the court may, in its discretion in furtherance of justice, receive additional evidence;[7] and even after the cause has been finally submitted, and the jury are deliberating on their verdict, it is held that evidence may be admitted.[8]

Sec. 570. Direct examination.—Much might be said as to the manner of conducting an examination of witnesses. One cannot be successful unless he has studied his case well. The examiner should know his witnesses, their temper and peculiar characteristics, and upon direct examination great care is to be exercised in developing the case in an orderly manner in harmony with his side of the controversy. A witness may be a poor one, in which case skill must be exercised in drawing out the facts. On the other hand, the witness may be able, if interrogated properly, to bring out all the facts clearly, and yet he cannot do so unless evoked by proper questions.

Examination of witnesses is not merely a process to ascertain information, but is the development of the facts which counsel know exist. Every transaction or controversy has its history, and it is well to develop the testimony in the regular order of occurrence if possible. One should not be in a hurry, but deliberate, inspiring confidence in the witness. "Naturalness in the demeanor of counsel, and in the language in which the questions are expressed, is always effective, while affectation is

[1] The mere irregularity is not sufficient ground for reversal. Bean *v.* Green, 33 O. S. 444. See Webb *v.* State, 29 O. S. 351; Railway Co. *v.* Bank, 1 O. C. C. 190, 207.

[2] Goodman *v.* Kennedy, 10 Neb. 270.

[3] Wilson *v.* Barkalow, 11 O. S. 470.

[4] Rosquist *v.* Furniture Co., 50 Minn. 192.

[5] Burns *v.* Harris, 66 Ind. 536.

[6] Shahan *v.* Swan, 48 O. S. 25.

[7] Gilbert *v.* Gilbert, 22 Ala. 529.

[8] Keeveny *v.* Ottman, 26 W. L. B. 65.

always harmful. Naturalness, however, does not imply familiarity, or lack of dignity and gravity."[1] It is the rule that leading questions are improper, but as it is within the discretion of the court, when it seems impossible to direct the attention of a witness to what is wanted, permission may be asked of the court to propound a leading question, which may be granted.[2] Counsel should suggest as little as possible by his question so as to have the witness tell the facts in his own way. It is more effective than to eliminate the answer by too much being embraced in the question.

David Paul Brown's "Golden Rule," advising counsel never to ask a question without an object which can be connected with the object of the case, is well put. There should be an intelligent purpose in every question.

Mr. Cox's suggestion that "Great caution is required in the examination of all your witnesses after the first, to prevent their disagreement in any particular," emphasizes the necessity of going over the testimony of each witness before trial and making a brief of it. All of the witnesses should be called into the office and examined privately before trial.

Sec. 571. Leading questions not allowed.—Leading questions, or those which suggest the answer, are not permitted to be asked. But this rule is varied when a hostile witness is encountered, the party producing him being allowed to ask leading questions. Such is the rule where a party offers a witness who appears to be in the interest of the other party, or who is unwilling to give evidence.[3] Leading questions may also be asked to refresh the memory of a witness, or for the purpose of identification of persons or things,[4] or upon cross-examination.[5] The mere fact that leading questions are improperly allowed is not reversible error,[6] as it must be remembered that the court is vested with discretion throughout the examination of witnesses. And as the purpose is to ascertain the truth in every controversy, it may be often necessary to obtain this result that leading questions be asked. A witness may forget important dates, or omit important matters which may not be reached in any other way than by asking direct or leading questions, in which event the examiner may appeal to the court, not as matter of right, but as a favor in furtherance of truth and justice, to permit

[1] Elliott's Pr., sec. 599.

[2] Vrooman *v.* Griffiths, 1 Keyes, 53 (N. Y.).

[3] 1 Greenleaf's Ev., sec. 435, and cases cited.

[4] Elliott's Gen. Prac., sec. 613.

[5] Legg *v.* Drake, 1 O. S. 286, 292. See sec. 579, *post*.

[6] Evans *v.* State, 24 O. S. 458.

leading questions to be asked, which, says an eminent writer, "will often be granted."[1]

Sec. 572. Party not concluded by unfavorable testimony of his own witness.—It is a well settled rule of evidence that a party is not concluded by the unfavorable testimony of his own witness, but may prove his case by other evidence. He is not precluded from proving any fact relevant to the issue, by any competent evidence, though it be a direct contradiction of the testimony of a former witness called by him.[2] And a party may examine an unwilling or hostile witness, in chief, something in the form and character of a cross-examination, at least to the extent of putting leading questions. A party who calls a witness may not ordinarily impeach his own witness, but may, if taken by surprise by his unexpected adverse testimony, interrogate him in respect to declarations and statements previously made by him which are inconsistent with his testimony, for the purpose of refreshing his recollection and inducing him to correct his testimony, or explain his apparent inconsistency.[3] And it has been held that after preliminary proof, and in the discretion of the court, it may be shown that the witness made previous statements to the contrary.[4]

Sec. 573. Anticipating adversary's evidence.—It is a general rule that neither party is bound to anticipate the evidence of his adversary, and that until the party having the burden of proof has introduced all his evidence in support of the issues it is unnecessary to introduce evidence to defeat an anticipated defense.[5] Prof. Greenleaf, however, states the doctrine that how far one shall proceed with evidence, in anticipation of a defense, is confided to the discretion of the court, to be regulated according to the circumstances of the case.[6]

Sec. 574. When a witness may be cross-examined.—The term "cross-examination" implies that the witness has already been examined in chief, and the right to cross-examine a witness is understood, according to American jurisprudence, to be the right to interrogate the witness of an adversary after he has been examined by such adversary, as to such matters as have been inquired of in chief, and as to such other matters as we shall presently see may be entered into.

[1] Elliott's Gen. Prac., sec. 601, citing Vrooman *v.* Griffiths, 1 Keyes, 53; Doran *v.* Mullen, 78 Ill. 342.

[2] Blackwell *v.* Wright, 27 Neb. 269; 20 Am. St. Rep. 662.

[3] Hurley *v.* State, 46 O. S. 320.

[4] Selover *v.* Bryant, 54 Minn. 434; 40 Am. St. Rep. 349, and note.

[5] Dodge *v.* Dunham, 41 Ind. 186.

[6] 2 Phillips on Evidence, 397; Legg *v.* Drake, 1 O. S. 286, 290.

It has been held in England that when a competent witness has been called and sworn on one side, the other party will in strictness be entitled to cross-examine him, although the party calling him has not examined him in chief at all[1]. The English rule has been adopted and followed in some of the American States.[2] A different practice, however, prevails in Ohio and other States, that a witness, though called and sworn, but who has not actually testified, cannot be cross-examined.[3]

A party may be examined as if under cross-examination, at the instance of the adverse party, either orally or by deposition, as any other witness; but the party calling for such examination shall not be concluded thereby, but may rebut it by counter-testimony.[4]

Sec. 575. The object of cross-examination.—Much that is instructive might be said by a skillful cross-examiner upon the objects of the cross-examination. In many instances the examiner will be more skillful if he does not cross-examine at all. There should certainly be no cross-examination unless there be a well defined purpose in view, as it would be a very unwise course to go on a fishing or hunting expedition, as the game might not be of the right kind.

The purpose or object of cross-examination is very aptly expressed by Bartley, Justice,[5] as follows: "The term cross-examination, would not strictly import anything more than a leading and searching inquiry of the witness for further disclosures touching the particular matters detailed by him in his examination in chief. This, however, is said to be one of the principal and most efficacious tests which the law has devised for the discovery of truth. And inasmuch as it has for its object the disclosure of not merely the extent and degree of accuracy of the witness' knowledge, as well as the means of his knowledge, but also his motives, inclinations, powers of memory and relative situation in respect to the parties, and the subject-matter of the investigation, it becomes an important test of the credibility of the witness."

To further these objects, therefore, it certainly is unwise to have the witness take up each item of his testimony in chief, and again go over it in all its details, but the particulars about which the cross-examiner desires to inquire, and out of which he ex-

[1] 1 Greenleaf's Ev. (15th ed.), sec. 74, and authorities.

[2] Jackson *v.* Varick, 7 Cow. 238; affd. in 2 Wend. 166; Fulton Bank *v.* Stafford, 2 Wend. 483; Linsley *v.* Lovely, 26 Vt. 123; Moody *v.* Rowell, 17 Pick. 490; Blackington *v.* Johnson, 126 Mass. 21; 1 Greenleaf on Ev., sec. 445, n. 3, and cases cited.

[3] Legg *v.* Drake, 1 O. S. 286, 290; Ellmaker *v.* Buckley, 16 Serg. & Rawle, 72.

[4] Code, sec. 5243.

[5] Legg *v.* Drake, 1 O. S. 286, 291.

pects to gain some vantage, should be specially inquired into, and such additional matters called out as can be. In testing the accuracy of the witness, counsel does not want to endeavor to have him contradict himself on very small matters, as nothing will be gained in the estimation of the court or a sensible jury. A witness will remember the main facts of his story, but may not be so exact as to minor or unimportant matters. Going over the whole story and bringing out everything possible very often only strengthens the testimony of the witness.

The question of most importance, so far as matters of practice are concerned, is the limits of cross-examination.

Sec. 576. Limits of cross-examination.—The determination of the limit to cross-examination is facilitated by a consideration of its objects. To test the accuracy of a witness, his means of knowledge, his motives, inclinations, powers of memory, and relative situation in respect to the parties, the scope of the examination must take in many instances a wide range. It is said that when a witness has been examined by one party, whether the right of the other party to cross-examine him is limited to the matters upon which he has already been examined in chief, or extends to the whole case, does not appear to be settled by a perfect concurrence of authority.

It is stated by our best authors, generally, that it is well established that a party has no right to cross-examine a witness except as to matters and circumstances examined into in chief, or connected with those matters; and that if he wishes to examine him as to other matters, he must do so by making the witness his own, and calling him, as such, in the subsequent progress of the cause.[1] That statement is supported by excellent authority, and is very complete, more so probably than one would think at first reading, but it is lacking in some respects, to be in entire harmony with the rule prevailing in Ohio. These matters connected with what the witness has stated on examination in chief may embrace those things which may be appropriately gone into on cross-examination to test the accuracy, his knowledge, motives, inclinations, prejudices, etc., but would not include facts which were necessary for plaintiff to prove to maintain his cause, but about which he had not inquired of the witness on his examination in chief. The rule in Ohio, therefore, has been extended one step further, and allows the cross-examination to be extended generally to the merits of the cause, or to any matters embraced within the issue. Bartley, Justice, thus expresses the rule:

[1] 1 Greenleaf on Ev. (15th ed.), sec. 445.

"It would appear that the fair conclusion, from all the authorities, is, that the right of cross-examination is not to be limited by the particular facts disclosed in the examination in chief, but may be extended to whatever the party calling the witness is required to establish to make out and sustain the cause of action or his defense. Thus a witness of the plaintiff may be cross-examined by the defendant, touching all matters which it is competent for the plaintiff to prove under the issue, in order to entitle him to recover. And on the other hand, the plaintiff may cross-examine the defendant's witnesses to all matters which the defendant may prove under the issue, in order to sustain his defense."

Guided by these rules, therefore, a defendant may cross-examine a witness of plaintiff upon new matter, that is, matter not gone into in chief, if it be matter which the plaintiff must necessarily prove to make his case, and as to such matter he will not be making the witness his own. But if the new matter be such as the plaintiff must prove to maintain his issues, it would then of necessity have to be matter which the defendant himself would have to prove to maintain his defense, and as to such matter he would make the witness his own, but upon principle such matter would not come within the province of cross-examination. There is another rule of evidence precluding his going into it even while he is conducting a cross-examination, although, as stated, it would not be within the limits of cross-examination. A party cannot, before the time for opening his case, introduce it to the court or jury by the cross-examination of the witnesses of his adversary.[1] It is true that the order in which the testimony may be introduced is largely within the discretion of the court, still a defendant has no right to go into a distinct matter of defense before the plaintiff has rested.

To what extent a party may test the temper,[2] or memory,[3] or his knowledge, judgment or bias,[4] rests largely within the discretion of the court. It is clear that the cross-examiner should not go into questions which are purely matters of defense.[5]

Sec. 577. Same, continued—As to collateral matters.—It is a general rule of evidence that it must be confined to the issue, and that inquiry into facts entirely collateral and leading to a controversy over matters altogether foreign to the case, is not

[1] Legg *v.* Drake, 1 O. S. 286, 292; Ellmaker *v.* Buckley, 16 Serg. & Rawle, 72.

[2] Czezewka *v.* Benton, &c., Ry. Co., 25 S. W. 911; 121 Mo. 201.

[3] Noblin *v.* State, 14 So. 767.

[4] Santa Anna *v.* Harlin, 99 Cal. 538; Taft *v.* Railroad Co., 157 Mass. 297; Washburn *v.* Railway Co., 84 Wis. 251

[5] Bennett *v.* State, 10 O. C. C. 84.

permitted.[1] And this is so when evidence is introduced for the purpose of corroboration.[2] It must not be remote or conjectural, but there should be an open and visible connection between the principal and evidentiary facts and deductions.[3] And while it is the settled rule that the extent to which immaterial matters may be inquired into upon cross-examination, rests in the sound discretion of the court,[4] yet a witness should not be cross-examined as to any fact which is collateral and not material to the issue, merely to contradict him,[5] because when questioned as to such collateral and immaterial matter his answer is, in general, conclusive upon the party inquiring.[6] Irrelevant questions tending to disgrace or criminate a witness should not be asked for the purpose of contradiction.[7] The witness may be interrogated, however, in criminal cases, as to whether and how many times he has been arrested, for the purpose merely of affecting his credibility, but an answer to such questions cannot be enforced. If voluntarily answered, however, it is binding upon the State.[8] And the limit to this mode of cross-examination is confined to the discretion of the court, and there is no remedy unless there has been an abuse.[9] There can be no error or ground for the reversal of the court, to compel a witness to answer a question not relevant to the issue.[10]

It must be remembered, however, that the chief purpose of the code was to remove the disability or incompetency to testify on account of interest and conviction of crime, the latter of which rendered the party infamous and wholly unworthy of credit at common law. While the code restores his competency, still conviction of crime may be shown for the purpose of affecting credibility. The effect of a conviction is to impeach the character of a witness. But it is quite proper and perfectly legal to show many years of upright conduct by which such a party has established among those who know him a reputation for truth, for the purpose of rebutting such testimony. So where a witness on cross-examination admits his conviction and confinement in a penitentiary for a crime involving moral turpitude, it is competent for a party who calls him to establish his good character for truth by adducing evidence of his general reputation in that respect.[11]

[1] Devere *v.* State, 5 O. C. C. 509; Clinton *v.* State, 33 O. S. 27.

[2] Henkle *v.* McClure, 32 O. S. 202.

[3] Bank *v.* Stewart, 114 U. S. 224..

[4] Village of Shelby *v.* Claggett, 46 O. S. 549; Wroe *v.* State, 20 O. S. 460; Bank *v.* Slemmons, 34 O. S. 142; Hanoff *v.* State, 37 O. S. 178; Dresback *v.* State, 38 O. S. 365: Tullis *v.* State, 39 O.S.200; Kent *v.* State, 42 O. S. 426,429.

[5] Clinton *v.* State, 33 O. S. 27; Elliott's Gen. Prac., sec. 658.

[6] Kent *v.* State, 42 O. S. 426.

[7] Williams *v.* State, W. 43.

[8] Coble *v.* State, 31 O. S. 100; Hanoff *v.* State, 37 O. S. 178.

[9] Hanoff *v.* State, *supra;* Holz *v* Dick, 42 O. S. 23.

[10] Bank *v.* Slemmons, 34 O. S. 142.

[11] Wick *v.* Baldwin, 51 O. S. 51.

Sec. 578. Cross-examination as to inconsistent statements.—It is legitimate to interrogate a witness as to previous statements made by him which either contradict, vary, reaffirm, qualify or deny what he states on the stand. This may be done as to statements made by a witness out of court,[1] or in a former trial or examination of the same case.[2] The witness may be compelled to respond to questions which deny his statements in his examination in chief.[3]

Sec. 579. Leading questions on cross-examination.—Leading questions, it is said, may sometimes be asked upon cross-examination.[4] Although the cross-examination generally admits of leading questions, yet if the cross-examination has respect to, and is in reference to new matter or topics disconnected with the subject of the direct examination, leading questions cannot be asked.[5] The court may, however, in the exercise of its discretion, permit leading questions to be put, although relating to matters not inquired into upon direct examination.[6] The mere fact that leading questions are improperly allowed, although as of right, is not reversible error, because of its being a matter of discretion with the court.[7]

Sec. 580. Evidence in rebuttal.—When all the testimony in chief has been introduced by the parties they will then be confined to rebutting testimony, unless the court, for good reasons in furtherance of justice, permits them to offer evidence in their original case.[8] While it is proper for the plaintiff to introduce all of his evidence upon direct examination, still circumstances may arise where justice will require that evidence which ought to have gone in in chief, should be admitted during the offering of rebuttal. In some cases it may be difficult to introduce new facts by way of rebuttal without in a measure repeating former testimony. Some latitude should be allowed for the exercise of discretion. The exigencies of each particular case must go far in controlling the discretion of the court. The practice, however, of recalling witnesses for the purpose of repeating, by assuming the name and character of rebutting testimony, is reprehensible and should not be allowed.[9] Ordinarily the party holding the affirmative should give all his testimony in support of the issues

[1] Devere *v.* State, 5 O. C. C. 509, 521; 3 O. C. D. 249.

[2] Turner *v.* State, 5 O. C. C. 537; s. c. 3 O. C. D. 263

[3] Phillips *v.* Elwell, 14 O. S. 240.

[4] 1 Greenleaf's Ev., sec. 447; Elliott's Gen. Prac., sec. 654.

[5] Legg *v.* Drake, 1 O. S. 286, 291; Harrison *v.* Rowan, 3 Wash. C. C. 584.

[6] Legg *v.* Drake, *supra;* Moody *v.* Rowell, 17 Pick. 490.

[7] Evans *v.* State, 24 O. S. 458.

[8] R. S., sec. 5190; Morris *v.* Faurot, 21 O. S. 155.

[9] Morris *v.* Faurot, 21 O. S. 155; Strauss *v.* Dashney, 12 W. L. B. 182.

in the first instance, and only give such evidence in reply as tends to answer the new matter introduced by his adversary; and any relaxation of this rule is left to the sound discretion of the court.[1] So that it follows that if testimony is admitted which is not strictly rebuttal, and which should have been introduced in chief, it is not *per se* ground for reversal.[2] Where evidence is only properly admissible in chief, but the party omits to offer it then, and without explanation offers it in rebuttal, and it is then rejected, a reviewing court will not pass upon its competency.[3] In the admission of improper evidence on the part of a defendant which operates only to rebut evidence improperly introduced by the plaintiff, there is no prejudice to the latter.[4] If in the close, the plaintiff introduces evidence of a new and distinct fact, without notice, the defendant should be allowed to answer or contradict it.[5] Where the plaintiff recalls a witness in rebuttal who has testified in chief, who contradicts the testimony of the defendant and his witnesses, the defendant has the right to prove his reputation for truth and veracity.[6] New evidence, or evidence of new facts, first offered by a party in rebuttal, may afterward be rebutted by his adversary.[7] The same rules apply to testimony in rebuttal as to testimony in chief.[8]

Sec. 581. Admission of testimony of doubtful competency subject to reconsideration.—Where the court is in doubt as to the admissibility of evidence, the same may be admitted subject to reconsideration at a later stage of the trial; and if the court is then convinced that it ought not to be admitted for any reason, it may be withdrawn from the jury.[9] Where incompetent evidence is admitted, but during the progress of the trial it is withdrawn by the court and the jury instructed to disregard it, there can be no ground for error.[10] To completely destroy the effect of incompetent testimony once admitted, the court should instruct the jury to disregard it entirely;[11] and no error can be assigned for its admission.[12]

Sec. 582. Requiring person injured to submit his person to examination.—In an action for personal injuries, caused by the

[1] Graham *v.* Davis, 4 O. S. 362. Morris *v.* Faurot, 21 O. S. 155; Webb *v.* State, 29 O. S. 351.

[2] Foy *v.* St. Ry. Co., 10 O. C. C. 151; 6 O. C. D. 396; Kane *v.* Stone, 2 Clev. 290.

[3] Hills *v.* Ludwig, 46 O. S. 373.

[4] Taylor *v.* Boggs, 20 O. S. 517.

[5] Kent *v.* Lincoln, 32 Vt. 591; Clayes *v.* Ferris, 10 Vt. 112. See Walker *v.* Fields, 28 Ga. 237.

[6] Marts *v.* State, 26 O. S. 162.

[7] National Ben. Asso. *v.* Harding, 7 O. C. C. 438; 4 O. C. D. 668.

[8] Meeker *v.* Browning, 17 O. C. C. 548.

[9] Barrow *v.* Mallory, 89 Ga. 76.

[10] McGuire *v.* State, 3 O. C. C. 551.

[11] Henkle *v.* McClure, 32 O. S. 202.

[12] Mimms *v.* State, 16 O. S. 221.

negligence of the defendant, the court has power to require the plaintiff to submit his person to an examination by physicians or surgeons, when necessary to ascertain the nature and extent of the injury. And on the refusal of the plaintiff to comply with such order, when properly made, the court may dismiss the action, or refuse to allow the plaintiff to give evidence to establish the injury.[1]

The court may order the plaintiff to submit himself to an examination or have his cause dismissed.[2] The use of the X-ray is now resorted to in personal injury cases to show the nature of the injury.

Sec. 583. Re-examination.—After a witness has been cross-examined, he may then be re-examined for the purpose of explaining any matter called forth by the adversary, or clearing obscurities, and "counsel has a right upon re-examination, to ask all questions which may be proper to draw forth an explanation of the sense and meaning of the expressions used by the witness on cross-examination, if they be in themselves doubtful, and also the motive by which the witness was induced to use expressions." But he cannot go further and introduce new matter, not referred to in cross-examination[3] as to which he might have been examined in chief. Any relaxation of the rule is but an exercise of discretion. If part of the matter is brought out on cross-examination, the whole may be brought out on re-examination.[4] If a cross-examination discloses the general nature of plaintiff's business, upon a re-examination the particulars of the business, so far as it reflects upon the issues, may be inquired into.[5] If on cross-examination a witness admits that he has taken an active interest in the cause in favor of the party calling him, he may explain his conduct on re-examination.[6] If a defendant goes beyond the proper limits of a cross-examination calling out an opinion of a witness favorable to his side, the plaintiff may then re-examine him on the same subject-matter.[7] New matter cannot as matter of right be gone into on re-examination, but is discretionary with the court.[8]

Sec. 584. Impeachment of witnesses.—This section outlines the modes of impeaching a witness.

[1] Turnpike Co. *v.* Bailey, 37 O. S. 104. See Elliott's Gen. Pr., sec. 683. See Sidekum *v.* Ry. Co., 3 Am. St. Rep. 549, and extensive note on p. 554, on this question.

[2] Railroad Co. *v.* Welsh, 22 W. L. B. 263.

[3] Holtz *v.* Dick, 42 O. S. 23, 27, quoting from Queen Caroline's case, 2 B. & B. 284.

[4] Elliott's Gen. Pr., sec. 665, citing McCracken *v.* West, 17 Ohio, 16.

[5] Bean *v.* Green, 33 O. S. 444.

[6] Stillwater Turnpike Co. *v.* Coover, 26 O. S 520.

[7] St. R. R. Co. *v.* Nolthenius, 40 O. S. 376, 381; Clipper *v.* Logan, 18 O. 375; Taylor *v.* Boggs, 20 O. S. 516.

[8] Elliott's Gen. Pr., sec. 668, and cases cited.

1. *What witnesses may be impeached.*—Generally the credibility of the adverse witnesses may be impeached, and a party may not, it is said, in the absence of a statute authorizing it impeach his own witness ;[1] and this, in all its force was, until more recently, the rule and practice in Ohio.[2] This rule has its qualifications. A party who calls a witness and is surprised by his unexpected and unfavorable testimony, may be permitted to question him regarding inconsistent statements and declarations which he has previously made, for the purpose of inducing him to correct his testimony, or to explain his inconsistency. His previous declarations may be repeated to him, and he may be asked to state whether he made them. The party is bound by his answers, and if the witness does admit his inconsistent position by denying his former statement, which any person would do, the party cannot prove them by other witnesses.[3] It really amounts to cross-examination, but the rule prevents the party from further degrading and humiliating his own witness. It compels him to have a little respect for the principle that lays at the root of the old rule preventing cross-examination of one's own witness, which is that he is presumed to know the character of his witness and to guarantee or represent him as worthy of belief. Otherwise why would he have called him ?[4] Yet there can be no serious objection to throwing off old shackles which have bound courts to action not consistent with truth and justice, the very objects of cross-examination. A party calling a witness supposes that the witness whom he calls will tell what every one ought—the truth. But if he does not, why should we stand mute and allow the adversary to reap the benefit of false testimony ? The adoption of this rule is a step forward and is right, but why not allow other witnesses to contradict him ?[5] The same rule prevails where a party is obliged to call a hostile witness, or where he has been deceived by fraud.[6] Where a witness testifies adversely to the party calling him, while the party cannot impeach his character, he may show the facts to be otherwise than as testified to by him;[7] that is he is not precluded from proving any fact relevant to the issue, by any

[1] Elliott's Gen. Pr., sec. 671 and numerous cases cited in note 1.

[2] Insurance Co. *v.* Schmidt, 8 Am. L. Rec. 628. This case is not cited as the authority for the rule, though it supports the statement. The rule announced by Judge Elliott in his Practice was the one followed in Ohio, until the innovation made by the case cited in the next note.

[3] Hurley *v.* State, 46 O. S. 320 and cases cited. Greenleaf's Ev., sec. 444; Elliott's Gen. Pr., sec. 672. The previous declarations of the witness cannot be made substantive evidence of the facts, and it is said that such a course of examination cannot be permitted merely for impeachment. *Id.*

[4] Thompson *v.* Blanchard, 4 N. Y. 303.

[5] See *ante*, sec. 572, and cases.

[6] Elliott's Gen. Pr., sec. 672.

[7] Carrington *v.* Davis, W. 735; Emrie *v.* Gilbert, W. 764.

competent evidence, though it be a direct contradiction of the testimony of a former witness called by him.[1] A defendant in a criminal case who goes on the stand may be impeached the same as any other witness.[2]

2. *Mode of impeaching.*—When a direct attack is made upon a witness it is by the introduction of evidence affecting his credit for truth and veracity. An indirect attack is made by disproving the facts stated by him by the testimony of others.

3. *Reputation for veracity.*—The general reputation of a witness can only be impeached or attacked; a witness cannot be permitted to give an opinion as to the character of the witness,[3] nor to state special acts or particular facts, as a witness cannot be supp sed to be prepared to explain or justify every act of his life.[4] This rule, however, does not apply to the cross-examination of a witness called to impeach another, as particular acts impeaching the credibility of the witness may be brought out.[5] The impeachment of his veracity should relate to his reputation as of the date of the examination,[6] though some authorities do not make this limitation, only requiring that it be near the time of examination, and confiding the matter to the discretion of the trial court.[7] The credibility of a competent witness cannot be impeached by showing that he is not possessed of ordinary intelligence.[8]

4. *Cross-examination of impeaching witness.*—The testimony of an impeaching witness may be tested by a cross-examination by requiring him to give the names of any persons whom he has heard discredit the character of the witness sought to be impeached, the time and place, and the number of persons whom he has heard speak disparagingly of the reputation of the witness, or any course may be taken to thoroughly test his means of knowledge.[9] The impeaching witness himself may be contradicted when he has first been interrogated in reference to the matter, by showing statements made by him out of court inconsistent with those testified to by him.[10] A party cannot, however, offer independent evidence with a view to impeaching a witness during the cross-examination of such witness.[11]

[1] Hurley *v.* State, 46 O. S. 322.

[2] State *v.* Beal, 68 Ind. 345; State *v.* Watson, 65 Me. 74.

[3] Bucklin *v.* Ohio, 20 Ohio, 18.

[4] Gleason *v.* Williams, Tapp. 142; Bucklin *v.* State, 20 Ohio, 18; Conley *v.* Meeker, 85 N. Y. 618; Dimick *v.* Downs, 82 Ill. 570.

[5] Gleason *v.* Williams, Tapp. 142; Steeples *v.* Newton, 7 Ore. 110.

[6] Pratt *v.* State, 19 O. S. 277 See also, Rawles *v.* State, 56 Ind. 433; Sun Fire Office *v.* Ayerst, 55 N. W. 635.

[7] Fisher *v.* Conway, 21 Kan. 18; Snow *v.* Grace, 29 Ark. 131, Pape *v.* Wright, 116 Ind. 510; Buse *v.* Page, 32 Minn. 111.

[8] Bell *v.* Rinner, 16 O. S. 45.

[9] Wilson *v.* Runyon, W. 652. See Bates *v.* Barber, 4 Cush. 107; Robbins *v.* Spencer, 121 Ind. 594.

[10] Berry *v.* State, 31 O. S. 219.

[11] National Ben. Assc'n *v.* Harding, 7 O. C. C. 438.

5. *How many witnesses are required to impeach veracity.*—The prevailing opinion is that it requires seven witnesses to impeach the reputation of another for truth and veracity. But the matter rests with the discretion of the court, usually from five to seven being sufficient.[1]

6. *Form of inquiry when impeaching veracity.*—A witness cannot testify until it be first ascertained whether he is qualified. The scope of the inquiry is strictly limited to the general reputation of the witness attacked for truth and veracity,[2] and that, too, in the community in which he lives.[3] There is no particular form of inquiry, but any words may be adopted which will ascertain whether the witness has sufficient knowledge to speak of the general reputation of the witness sought to be impeached.[4] This is the first step. A witness must have the means of knowing what the general reputation of the one attacked is, and cannot testify from his own personal knowledge.[5] He must, therefore, first be examined as to his knowledge of the general character, how it was acquired, the length of time he has known the witness. For instance: Do you know John Smith? How long have you known him? Have you the means of knowing his general reputation for truth and veracity in the community in which he lives? You may state what that reputation is?[6] And where the witness testifies that such reputation is bad, he may be further allowed to testify whether from such reputation or knowledge thereof, he would believe the witness sought to be impeached, under oath.[7] A leading author says that the propriety of allowing the witness to give his opinion has of late been questioned, and perhaps the weight of authority is now against permitting the witness to testify as to his own opinion.[8] But if the witness says that he has no knowledge of the general reputation of the person for truth and veracity, the inquiry must stop.[9]

7. *Evidence as to commission of crimes.*—Evidence cannot be introduced to prove a crime against a witness of which he has not been convicted, to impeach his credit. Yet if the question of the guilt of such witness becomes the subject of inquiry, his reputation for truth may be proved to rebut the imputation

[1] See Bunnell *v.* Butler, 23 Conn. 65.

[2] Perkins *v.* Mobley, 4 O. S. 669.

[3] Bucklin *v.* Ohio, 20 Ohio, 18.

[4] Craig *v.* State, 5 O. S. 605.

[5] Cowan *v.* Kinney, 33 O. S. 422.

[6] See Malloy *v.* Smith, Tapp. 76; Wilson *v.* Runyon, W. 651.

[7] Hillis *v.* Wyle, 26 O. S. 574; 1 Greenleaf's Ev., sec. 461.

[8] See cases cited in notes (5 and c), p. 608, 15th ed., Greenl. on Ev. Ohio then, if Greenleaf be right, is in the minority. But the rule in Ohio is not to ascertain the opinion of the witness, but to ascertain the true character as the witness understands it.

[9] Wilson *v.* Runyon, W. 652; Holmes *v.* State, 88 Ala. 29.

of guilt.[1] Nor can the credibility of a witness be impeached by showing conviction under municipal ordinance. A conviction may only be shown as affecting the credibility of a witness when it renders the witness incompetent to testify.[2] A witness is not compelled to answer, but may do so voluntarily.

If the witness admits conviction of a crime and confinement in the penitentiary, the party calling him may introduce evidence to establish his good character for truth.[3]

8. *Proof of contradictory statements* made previous to his examination are admissible to impeach a witness.[4] This cannot be done, however, until the witness himself is first examined as to such supposed contrary statement. Inquiry should first be made of the witness, being particular to ask him whether he made the conflicting statement to a certain person, at a specified time and place.[5] The foundation must be thus laid for contradicting a witness by conduct or inconsistent statements out of court, and it must be in reference to some material matter.[6]

9. *What weight shall be given to witness impeached.*—What credit shall be given the testimony of a witness sought to be impeached rests entirely with the jury. They must determine whether he has been successfully impeached or not; whether his testimony should be disbelieved, or whether, notwithstanding the impeachment, he is entitled to credit and has told the truth in the particular instance. The court should so instruct the jury; it would be error to charge the jury that if the general character of witness for truth is successfully impeached, they are bound to disregard the whole of his testimony.[7] They may do just the opposite; they may disbelieve part and believe part, or reject all of it.

Sec. 585. Withdrawal of evidence.—Where incompetent evidence is admitted by the court over the objection of either party, the court may in its discretion withdraw the same from the jury in a subsequent stage of the trial, and instruct the jury to wholly disregard it. This should only be done, however, when it will

[1] Webb *v.* State, 29 O. S. 351.

[2] Coble *v.* State, 31 O. S. 100.

[3] Wick *v.* Baldwin, 51 O. S. 51. See *ante*, sec. 577.

[4] Lamb *v.* Stewart, 2 Ohio, 230.

[5] King *v.* Wick, 20 Ohio, 88; Circleville *v.* Thorne, 1 O. C. C. 361.

[6] Dilcher *v.* State, 39 O. S. 130. As to materiality, Callahan *v.* State, 21 O. S. 310; Henkle *v.* McClure, 32 O. S. 202; Kent *v.* State, 42 O. S. 426; State *v.* Nevin, 23 W. L. B. 411; Brown *v.* Hunkin, 4 W. L. B. 676. The witness must be given the opportunity of being interrogated, and the fact that this opportunity has been cut off by the death of the witness makes no exception. Runyon *v.* Price, 15 O. S. 1. The impeachment of the credit of a witness by showing that he has made statements at other times contradictory of his testimony on trial, does not lay the foundation for sustaining him by proof of his reputation for truth. Webb *v.* State, 29 O. S. 351.

[7] Sharp *v.* State, 16 O. S. 218.

not be prejudicial to the other side,[1] and it cannot be demanded as a matter of right.[2]

Sec. 586. Objections to admission or rejection of evidence.— Counsel should constantly be on the alert for errors in the admission or rejection of evidence, and save his exceptions upon record. This tests the skill of the advocate as much as anything during the course of the trial. It tests the knowledge of what is competent and what is incompetent testimony. Making the record is an important matter. Error must appear on the face of the record.[3] This record consists of the bill of exceptions, and all objections to the admission or rejection of evidence should appear therein. There can be no complaint for the exclusion of evidence unless every part of it was competent for the purpose for which it was offered.[4] The objection must be made at the trial and before the question is answered,[5] and the same must be assigned for error in the motion for a new trial.[6] An objection without any reason given for it will not be considered on error.[7] It must specifically point out the grounds upon which it is founded, and all other than those pointed out are waived.[8] It is not enough to state that the evidence is incompetent, or that it is immaterial or irrelevant,[9] and unless all the evidence of the witness is objectionable, the particular part which is objectionable should be specified.[10]

Where there are two defendants, each of whom makes a separate denial which puts his liability in issue, any declaration made by either tending to show any kind of liability is competent against the one making it.[11] A general objection to testimony admissible as to one defendant but not as to another, is not sufficient; the testimony should be limited to the one against whom it is competent.[12] Where court rejects or rules out testimony to save exception to such ruling, the party offering the same, should state to the court what it is proposed and expected to prove by the witness. This rule applies to testimony in chief and in rebuttal.[13]

[1] McGuire *v.* State, 3 O. C. C. 551.

[2] Furst *v.* Railroad Co., 72 N. Y. 542.

[3] Courtright *v.* Staggers, 15 O. S. 511; Railroad Co. *v.* Collett, 6 O. S. 182; Palmer *v.* Yarrington, 1 O. S. 253.

[4] Kent *v.* State, 42 O. S. 426.

[5] Union Rolling Mill *v.* Packard, 1 O. C. C. 77.

[6] Stanton County *v.* Canfield, 10 Neb. 389.

[7] Railway Co. *v.* Pointer, 9 Kan. 620; Railway Co. *v.* Jones, 108 Ind. 531.

[8] Kent *v.* State, 42 O. S. 426, 430; Whitman *v.* Foley, 125 N. Y. 651.

[9] Railroad Co. *v.* Walker, 113 Ind. 196.

[10] Powell *v.* R. R. Co., 77 Ga. 192.

[11] Vannoy *v.* Klein, 122 Ind. 416.

[12] Taylor *v.* Deverell, 43 Kan. 469.

[13] Meeker *v.* Browning, 17 O. C. C. 548.

Sec. 587. Preponderance only necessary in civil cases.—An opinion has been expressed by a distinguished jurist who usually determined questions by tracing their history, that originally, no doubt, civil and criminal cases were alike determined by a preponderance of evidence; but that as men became more enlightened the rule was adopted in criminal cases that the accused should not be convicted if there was reasonable doubt as to his guilt.[1]

A preponderance of evidence is all that is required to sustain an issue in civil cases. This does not mean, as is well understood, the greater number of witnesses,[2] but the greater weight of credible testimony. And when a preponderance of evidence must determine the issue, the court, or jury in some cases, simply deals with the probabilities of the case.[3] It is the province of the court to charge the jury that it shall be governed by a preponderance of evidence, and it may not be improper to explain just what preponderance of evidence means. The preponderance is determined not alone by the number of witnesses testifying, but the jury may take into consideration the opportunities of the witnesses for seeing and ascertaining from their own knowledge, the things about which they testify, and the probability or improbability of the truth of their statements, in view of all the other evidence, facts and circumstances proven, and from the circumstances determine the preponderance.[4] If this be done, it will be remembered that there are no degrees of preponderance, and that it is not essential that it shall be of such degree, weight or character as that it must satisfy the minds of the jurors. The instruction should not qualify the word as *fair* or *clear* preponderance, as it might convey to the jury that the preponderance must be of a clear and convincing character. The opinion of the jury should not be fettered by grades in preponderance, or degrees in the weight of evidence. If it preponderates at all, it is sufficient. It would, therefore, be error to charge that the jury should be satisfied by a *fair* or *clear* preponderance, as that would cast a greater burden on the party than the law requires.[5]

A rule prevailed which has never been looked upon with much merit in Ohio, that when in a civil action a defense is made which would substantially charge a crime, it was necessary to prove the same beyond a reasonable doubt if the party were on trial for the same.[6] But the supreme court in some cases indicated

[1] Lyon *v.* Fleahman, 34 O. S. 151.

[2] Mitchell *v.* Hindman, 150 Ill. 538.

[3] Davis *v.* Guarnieri, 45 O. S. 470.

[4] Mitchell *v.* Hindman, 150 Ill. 538.

[5] Russell *v.* Russell, 6 O. C. C. 294; Scott *v.* Allenbaugh, 50 Mo. App, 130; Vorhies *v.* Hennessey, 7 Wash. 243; Mitchell *v.* Hindman, 150 Ill. 538; Crabtree *v.* Reed, 50 Ill. 207; Bitter *v.* Saathoff, 98 Ill. 266.

[6] Lexington *v.* Paver, 16 Ohio, 324, 331. Discussion by Hitchcock.

a purpose not to adopt this doctrine, and it is said by some writers that the tendency of modern decisions is to exclude such a rule from civil cases.[1] In one Ohio decision discussing a question of fraud, it was said that as it was so varied in form and so difficult of proof, the better rule was to require only a preponderance of evidence, unless in cases where fraud amounting to a criminal offense is directly in issue, in which case it would be better to require proof excluding reasonable doubt as in criminal cases.[2] But later the court did not adopt this view and held that when fraud is involved in a civil case, whether or not it amounts to a criminal offense, it need only be proved by a preponderance.[3] And so in a civil action for the recovery of damages for assault and battery, the assault and battery need not be proved beyond a reasonable doubt,[4] nor is it essential that illegal sales in an action for damages resulting from the sales of intoxicating liquor be proven beyond a reasonable doubt.[5] Nor in an action for slander for words imputing a crime, where the defense is that the defamatory words are true, is it necessary to prove the same beyond a reasonable doubt.[6] Other States have adopted the rule prevailing in criminal procedure in certain civil cases.[7] The party seeking to reform a conveyance or written contract for the sale of land, is bound to prove beyond a reasonable doubt that there was an agreement between the parties different from that which was embodied in the instrument.[8]

Sec. 588. Proof beyond a reasonable doubt in criminal cases.—Proof beyond a reasonable doubt is essential to warrant a conviction in criminal cases. It is very difficult to define what reasonable doubt is, and it would indeed seem better to leave its determination to the juror and his conscience. But some courts do not think this a safe rule. In Ohio it is the usual practice for the trial court to define the term in its charge to the jury, and when attempted it should be accurately done.[9] This will be found elsewhere.[10]

[1] Lyon *v.* Fleahman, 34 O. S. 151. 155; Jones *v.* Greaves, 26 O. S. 2; Wharton on Ev., sec. 1246; 10 Am. Law. Rev. 642; Sloan *v.* Gilbert, 12 Bush. 51; Ellis *v.* Buzzell, 60 Maine, 209; Decker *v.* Insurance Co., 66 Maine, 406.

[2] Strader *v.* Mullane, 17 O. S. 625; Jones *v.* Greaves, 26 O. S. 2.

[3] Jones *v.* Greaves, 26 O. S. 2. See also Daugherty *v.* Schlotman, 1 C. S. C. R. 298.

[4] Shaul *v.* Norman, 34 O. S. 157.

[5] Lyon *v* Fleahman, 34 O. S. 151.

[6] Bell *v.* McGinnis, 40 O. S. 204.

[7] Barton *v.* Thompson, 46 Iowa, 30; Kane *v.* Insurance Co., 39 N. J. L. 697; Wood on Ins., sec. 101.

[8] Rothschild *v.* Bell, 19 W. L. B. 137.

[9] Morgan *v.* State, 48 O. S. 371, 377. See as to other States, Bishop's New Crim. Pro., sec. 1094.

[10] Kinkead's Instructions, No. 187.

It will be remembered, however, that the defendant in a criminal cause is bound to prove any matters devolved upon him only by a preponderance of evidence as in civil cases.[1]

Sec. 589. Cases requiring clear and convincing proof.—There are many cases where the facts in issue are, by the rules of evidence, required to be proven by what is termed clear and convincing proof. This rule, however, is applied to a class of cases not within the province of the jury to determine, but appeals to the equity side of the court. For example, when it is sought to reform written instruments on the ground of mistake, clear and convincing proof is essential.[2] And so where it is sought to change the venue of a case there should be clear and satisfactory proof that a fair trial cannot be had in the county where the suit was commenced;[3] or where a trust is sought to be established by parol,[4] or a parol contract for the sale of land,[5] or a gift *causa mortis*,[6] is sought to be shown or established, clear and convincing proof is necessary. And so where it is sought to divert the estate of a deceased person from its natural and lawful channel of descent, by showing a verbal promise to make one an heir,[7] or where a person seeks to have an attachment discharged from a particular piece of property,[8] or where a wife claims that a deed signed by herself and husband has not been acknowledged as it purports to have been,[9] or where it is sought to set aside a conveyance on the ground of fraud,[10] clear and convincing proof is required.

Sec. 590. Evidence to sustain a negative allegation.—In some instances evidence must be given to sustain a negative allegation. A negative allegation may be essential to the ground of action, in which event it is a material element of the case. This may be so in criminal and civil cases. It is an essential feature in an action for malicious prosecution, want of probable cause being the negative averment, which must necessarily be proved by the plaintiff. If a criminal statute, in describing the offense, contains negative matter, then there must be affirmative proof. And where the negative allegation involves

[1] Bishop's New Crim. Pro., sec. 1095 and cases.

[2] Stewart *v.* Gordon, 60 O. S. 170; Potter *v.* Potter, 27 O. S. 34; Fellowes *v.* Insurance Co., 2 Disney, 128; Thompson *v.* Thompson, 18 O. S. 73, 83; Clayton *v.* Freet, 10 O. S. 545; Farr *v.* Ricker, 46 O. S. 265; Jung *v.* Wayland, 14 W. L. B. 144.

[3] Bank *v.* Ward, 11 Ohio, 128; State *v.* Elliott, 25 W. L. B. 366.

[4] Parker *v.* Parker, 5 O. C. C. 491, 495; Orr *v.* Orr, 6 W. L. B. 390.

[5] Parker *v.* Parker, *supra*.

[6] Gano *v.* Fisk, 43 O. S. 462, 473; Flanders *v.* Blandy, 45 O. S. 108, 113.

[7] Shahan *v.* Swan, 48 O S. 25.

[8] Bank *v.* Nash, 1 Handy, 153.

[9] Ford *v.* Osborne, 45 O. S. 1.

[10] Christmas *v.* Spink, 15 Ohio, 600.

a charge of criminal neglect of duty, whether official or otherwise, the person making it must prove it. But when the subject-matter of the negative averment lies peculiarly within the knowledge of the defendant, the averment will be taken as true, unless defendant disproves it.[1] On the trial of a charge of selling spirituous liquors not inspected, the State must give evidence that it was not inspected.[2]

Negative allegation must be made in some instances of contributory negligence.

Sec. 591. Attacking credibility of accused.—Courts permit the prosecution upon cross-examination of an accused to subject him to a severe examination as to specific acts, or whether or not he has been guilty of certain crimes, for the sake of affecting his credibility as a witness.[3] This rule seems to be generally pursued, but looking at its real effect it certainly is not a just one in many cases. The reason for its establishment cannot properly be applied to every case with fairness and justice to the accused. When accused for an assault or murder, it is said that he may be asked whether he had not assaulted other persons,[4] or that he may be asked whether or not he has committed a certain crime,[5] or been imprisoned in the penitentiary.[6] This course of examination under the rule is allowed to be pursued promiscuously without a definite purpose, and without real logic. A person charged with perjury may have committed arson, for which he was convicted, and yet be able to tell the truth. Indeed, one charged with a crime may have been convicted of innumerable offenses which may have no real bearing on the truthful qualities of his character, yet he must he made to admit conviction of all these offenses so that the jury may be able to judge of his character for truth and veracity. Sensible jurors, however, will not measure the prisoner's word by such tests, but will look to his testimony, his manner, and the usual tests applied in determining or in ascertaining truth. If the accused be a vicious criminal and is compelled to admit all of the crimes committed by him, the jury may convict him on general principles, though he told the truth. Hence courts should exercise a sound discretion over this sort of examination, which may very properly be done, and refuse to admit testimony unless it really does affect the accused's credibility or tend to contradict testimony

[1] Cheadle *v.* State, 4 O. S. 478, 9; Moody *v.* State, 17 O. S. 110; Greenleaf's Ev., secs. 78, 80.

[2] Cheadle *v.* State, 4 O. S. 474, 477.

[3] State *v.* McGuire, 15 R. I. 23.

[4] People *v.* Casey, 72 N. Y. 393; State *v.* Huff, 11 Neb. 17; People *v.* Hooghkerk, 96 N. Y. 149.

[5] People *v.* Noelke, 94 N. Y. 137; People *v.* Johnson, 57 Cal. 571.

[6] People *v.* Courtney, 31 Hun, 199; 94 N. Y. 490

given by him.[1] The accused, as a witness in his own behalf, is subject to the same rules as are other witnesses, and no other.[2]

Sec. 592. Evidence as to character of accused.—It is an established rule of criminal evidence that the accused may show his previous good character with respect to the offense with which he is on trial, though his general character cannot be shown;[3] and this must be shown by his general reputation.[4]

[1] See State *v.* Huff, 11 Nev. 17.
[2] Brandon *v.* People, 42 N. Y. 265.
[3] Johnson *v.* State, 17 Tex. App. 565; State *v.* Kinley, 43 Ia. 294; People *v.* Josephs, 7 Cal. 129; State *v.* LaPage, 57 N. H. 245.
[4] Simmons *v.* State, 4 W. Va. 755.

CHAPTER XXVIII.

CONDUCT OF JURY.

SEC.
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594. Separation of jury during trial—In criminal cases.
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596. Separation after retirement in civil cases.
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623. Misconduct of jury, how taken advantage of.

SEC. 593. Separation of jury during trial—In civil cases.—The code vests the trial court with discretionary power to permit the jury in the trial of civil cases to separate from each other during the progress of the trial and before the cause is finally submitted to them.[1] It being discretionary, the pertinent question to be considered in connection with the separation of the jury, therefore, is whether or not they have violated the admonitions given them[2] or been guilty of misconduct during separation such as to warrant setting aside their verdict. It is the universal rule that inquiry will be made whether or not injury has ensued from the separation of the jury by leave of the court, and where no abuse is shown separation will be immaterial.[3]

[1] Whittaker's O. Code, sec. 5193.

[2] Sec. 601, *post*.

[3] Sanitary District *v.* Cullerton, 147 Ill. 386. Where two of the jurors without knowledge or consent of parties, separate from the other jurors and view the premises alone, it is not such misconduct as to warrant granting of a new trial. Ry. Co. *v.* Rawlins, 29 W. L. B. 260.

Sec. 594. Separation of jury during trial—In criminal cases.—The strictness of the ancient practice in respect to the supervision and restraint imposed upon juries has in modern times been everywhere much relaxed. The extent of that relaxation is by no means uniform in the different States. In England and in many of the States, the practice prevailed that the jury were not permitted to separate in capital cases after being sworn, and there was a distinction made between misdemeanors and felonies. In Ohio, under a former statute, the jury in the trial of felonies were not permitted to separate after being sworn.[1]

This provision caused such general dissatisfaction that it was repealed, and in its place a statute was enacted which is now in force, providing: That if the jurors be permitted to separate during the trial, they shall be admonished by the court that it is their duty not to converse, nor suffer themselves to be addressed by any person, nor to listen to any conversation on the subject of the trial, nor form or express an opinion thereon, until the cause is finally submitted to them.[2]

This provision was intended to be applicable both to capital cases and misdemeanors. If such had not been the intention there would have been an express provision as to capital cases. Therefore the rule and the practice under this statute, as it has been considered by courts, is that in all grades of criminal cases the matter of the separation of the jury, after being sworn, and before the case is finally submitted to them, is confided to the discretion of the trial court.[3] It is obviously necessary in many cases, where there is strong partisan feeling or the public is greatly excited over a crime, that the jury should not be permitted to separate. And this practice generally prevails.[4]

Sec. 595. Retirement for consideration when case submitted.—When a civil case is submitted, the jury may decide in court, or retire for deliberation.[5] In criminal cases the statute evidently requires them to retire. In both civil and criminal cases when the jury retire they must be kept together in some convenient place, under the charge of an officer, until they agree upon a verdict or are discharged by the court.[6]

[1] 68 Ohio Laws, 5. See also Parker *v.* State, 18 O. S. 88, 90; Sargent *v.* State, 11 Ohio, 472; State *v.* Engles, 13 Ohio, 490; Davis *v.* State, 15 O. 72; Cantwell *v.* State, 18 O. S. 477, 482.

[2] R. S., sec. 7312.

[3] Bergin *v.* State, 31 O. S. 111, 114, 115 (1876). See also Parker *v.* State, 18 O. S. 88, 90; Sargent *v.* State, 11 Oh. 472; State *v.* Engels, 13 O. 490; Davis *v.* State, 15 O. 72.

[4] It is within the sound discretion of the court whether a juror shall be permitted to attend his place of business during a criminal trial. Baker *v.* State, 59 N. W. 570; 88 Wis. 140. The jury should not be discharged for any length of time after commencement of a trial because of inability of witnesses to attend. People *v.* Dinsmore, 102 Cal. 381.

[5] R. S., sec. 5192.

[6] R. S., secs. 5192 (civil), 7312 (criminal).

Sec. 596. Separation after retirement in civil cases.—When a civil cause has been submitted and the jury have retired for deliberation, the code provides that they must be kept together in some convenient place, under charge of an officer, until they agree upon a verdict or are discharged by the court, subject however, to the power of the court to permit them to separate temporarily at night, and at their meals.[1]

As a general rule, a jury should not be permitted to separate after retiring, until they have agreed upon a verdict. Still there may be peculiar circumstances which may justify a separation, at times other than at nights and meal time. But they should not leave their room except at the times mentioned in the statute and with the permission of the court, and mingle with outsiders and afterwards return to their room and agree upon a verdict.[2]

A separation of the jurors after the jury had retired for deliberation, induced by a sudden alarm of fire in the near vicinity of the jury-room, is not of itself such misconduct as will vitiate the verdict made on reassembling.[3]

Sec. 597. Separation after submission in criminal cases.—The provision of the criminal code with reference to the separation of a jury after they have retired to consider their verdict is: When a case is finally submitted, the jurors must be kept together in some convenient place under the charge of an officer, until they agree upon a verdict or are discharged by the court; the officer having them in charge shall not suffer any communication to be made to them, nor to make any himself, except to ask them if they have agreed on a verdict, unless by order of the court.[4]

This section seems to require that the jury shall be kept together after submission of the case, as it does not say in express terms, as does the civil code, that they shall be permitted, within the discretion of the court, to separate. The same section, however, does provide that the jury may be permitted to separate during the *progress of the trial*, but does not say that it shall be permitted to separate *after retirement*. This significant omission, it has been held, leaves the law in that respect as it was before the passage of the code.[5] Adjudications before the enactment of this provision were against permitting the separation of the jury.[6]

[1] O. Code (Whittaker's), sec. 5192; Parker *v.* State, 18 O. S. 88, 90 (1868).

[2] Sutliff *v* Gilbert, 8 O. 405, 409 1838).

[3] Armleder *v.* Lieberman, 33 O. S. 77.

[4] R S., sec. 7312.

[5] Weiss *v.* State, 22 O. S 486, 490.

[6] Parker *v.* State, 18 O. S. 88.

Under the statute and according to the rule established by authorities elsewhere, the jury should not be permitted to separate after the submission of the case.[1]

It would be entirely impracticable, however, to establish a rule that there should be no sort of separation of the jurors while considering a verdict if their deliberations are protracted, as it will be necessary for them to respond to the calls of nature,[2] to procure their meals,[3] and other things of like nature.[4]

Sec. 598. Separation after verdict agreed upon in criminal cases.—The court may, in the exercise of its discretionary power in a criminal case, direct the jury to seal up their verdict, separate and bring it in, in open court, should they arrive at a verdict when the court is not in session.[5] When this course is taken it is essential that the verdict, still unsealed, should be in court when the same is received, and the jury should be present in open court so that an opportunity may be afforded to poll the jury, in order to give a verdict thus made legal effect.[6]

Sec. 599. Separation after verdict agreed upon in civil cases.—The same discretionary power is vested in the trial court in civil cases to permit a jury after having arrived at a verdict when the court is not in session, to put it under seal and deliver it to the clerk and then separate. And it is not error in the court to re-assemble the jury for the delivery of the verdict, nor for the jury to separate after agreeing upon a verdict without leave of court.[7] This verdict they return when the court convenes, and it is necessary, when the verdict is delivered in court, that the jury should be present.[8] The verdict thus rendered has the same effect, and must be treated in the same manner, as if returned in open court, before any separation of the jury had taken place.[9] It has also been held that where the jury separates after having determined upon a verdict, and the court finds that they have not been influenced by anything that is said to them after separation, permission may be given them to re-assemble and put their finding in writing.[10] But if, after having once agreed and put their verdict under seal, a jury separates and subsequently

[1] Thompson on Trials, sec. 2551; Abbott's Trial Brief Crim. Case, p. 180.

[2] Gandy *v.* State, 24 Neb. 716.

[3] State *ex rel. v.* Armstrong, 19 O. 116.

[4] See Bishop Crim. Proced., secs. 997–8, Vol. 1.

[5] State *v.* Engle, 13 Oh. 490; Bainbridge *v.* State, 30 O. S. 264; Sargent *v.* State, 11 O. 472.

[6] Abbott's Crim. Brief, p. 511; Sargent *v.* State, 11 Oh. 472.

[7] Wright *v.* Burchfield, 3 Oh. 53; Sutliff *v.* Gilbert, 8 Oh. 405; Thompson on Trials, sec. 2552 and cases.

[8] Bishop *v.* Mugler, 33 Kan. 145.

[9] Sutliff *v.* Gilbert, *supra.*

[10] Luttrell *v.* Martin, 112 N. C. 593; Petty *v.* Rousseau, 94 N. C. 355; State *v.* Shelly, 98 N. C. 673.

meet in their room and change this sealed verdict, such altered verdict cannot stand. This would be such misconduct for which the verdict may be set aside.[1]

Sec. 600. Jury should be placed in charge of sworn officer.—During the progress of a trial when the jury are not permitted to separate, as well as after a case has been submitted, the jury should be placed in charge of an officer until they agree on a verdict, or are discharged by the court. The officer must observe the injunctions as to the permission of communications made with the jury, discussed in another section,[2] and should not before the verdict is rendered communicate to any person the state of their deliberations, or the verdict agreed upon.[3]

The statute is silent as to administering an oath to the officer, presumably because the jury is usually placed in charge of a regularly elected or appointed officer, who has already taken an oath of office. In such case a special oath need not be administered.[4] The objects in administering a special oath to the officer, as in ancient practice, have passed away under the present procedure. When a special bailiff, not a regular officer, is placed in charge of the jury, he should of course be sworn. And it has been held that where the oath is not administered to the officer, there is no material error.[5]

Sec. 601. Cautioning jury when permitted to separate.—The code—civil and criminal—requires the court when the jurors are permitted to separate, either during the trial, or after the case is submitted to them, to admonish or caution them that it is their duty not to converse with, nor suffer themselves to be addressed by any other person, on any subject of the trial (in criminal cases not to listen to any conversation on the subject of the trial), nor to form or express an opinion thereon until the cause is finally submitted to them.[6] This is directory merely, and failure to do so is not prejudicial, and not available on error, especially where no exception is taken.[7]

[1] Sutliff *v.* Gilbert, 8 O. 405.

[2] Sec. 603.

[3] R. S., secs. 5192 (civil cases), 7312 (criminal cases).

[4] Boreham *v.* Byrne, 83 Cal. 23; Davis *v.* State, 15 O. 72.

[5] State *v.* Crafton, 56 N. W. 257; 89 Ia. 109; Deranleau *v.* Jandt, 37 Neb. 532. Even though a jury retires in charge of an officer who is neither a regular officer, or who has not been specially sworn, has been considered not ground for a new trial. Baker *v.* State, 4 Tex. App. 223; Slaughter *v.* State, 24 Tex. 410. The fact that a sheriff permitted a constable in attendance upon court, to watch the door of the jury-room in his temporary absence, is immaterial, whether the constable be sworn or not. When the jury retire in charge of a sheriff or qualified constable such officers need not be specially sworn. Davis *v.* State, 15 O. 72.

[6] R. S., secs. 5193, 7312.

[7] Johnson *v.* Matthews, 12 W. L. B. 197; Stewart *v.* Randolph, 2 C. S. C. R. 132; Pritchett *v.* State, 18 S. E. 536; 92 Ga. 33, 93.

Sec. 602. Effect of separation of jury.—The separation of the jury in civil and criminal cases being discretionary with the trial court, it is, therefore, obvious that it will not furnish ground for a new trial merely because there has been a separation, but that there must be something of a substantial prejudicial character occur during separation which operates to prevent a fair and impartial trial.[1] This must depend upon circumstances and the facts of particular cases, and an unvarying rule further than the foregoing cannot safely be made. There is no good ground for granting a new trial where a juror separates from others, without permission of court, unaccompanied by an officer, when it does not interfere with the fairness of the trial,[2] or where he does not have any communication with any person,[3] or where a juror answers a call of nature,[4] or where the jury walk to the scene of murder in charge of the officer, during recess,[5] or where one juror goes into another room and has an officer write out the verdict under his directions,[6] or where a juror is seen in conversation with a stranger in the absence of grounds for suspecting any improper influence,[7] or where the separation is induced by a sudden alarm of fire in the vicinity of the jury-room.[8]

There are many cases on this question reported in the books. The rule most clearly established by the cases appears to be, that, however improper the conduct of the juror may have been, yet, if it does not appear to have in any degree been occasioned by the prevailing party, or any one in his behalf, and indicates no improper motive or bias in the mind of the juror, and the court cannot discover that it either had or probably might have had an effect unfavorable to the party asking for a new trial, the verdict cannot be disturbed.[9] The misconduct of a jury in a civil case, which would render it necessary to set aside a verdict and grant a new trial, should be of such a character as to evidence bad intentions.[10] Though the jurors may converse with persons during the progress of a trial to such an extent as to deserve censure, yet if it appear that there was no abuse, and no injury resulting therefrom, there can be no ground for granting a new trial.[11]

[1] Roper *v.* Territory, 33 Pac. 1014; 7 New Mex. 255; State *v.* Dugan, 52 Kan. 23; Milo *v.* Gardner, 41 Me. 549; State *v.* Brannon, 45 Mo. 329.

[2] Wakefield *v.* State, 41 Tex. 556; Jack *v.* State, 26 Tex. 4; Johnson *v.* State, 27 Tex. 770.

[3] State *v.* Turner, 25 La. Ann. 573.

[4] Neal *v.* State, 64 Ga. 272.

[5] Brown *v.* Commonwealth, 19 S. E. 447; 94 Va. 671.

[6] Territory *v.* Edie, 7 New Mex. 183.

[7] State *v.* Igo, 21 Mo. 459.

[8] Armleder *v.* Lieberman, 33 O. S. 78, 82.

[9] Armleder *v.* Lieberman, 33 O. S. 77, 82; McIlvaine *v.* Wilkins, 12 N. H. 474; Andrews *v.* Tinsley, 19 Ga. 303.

[10] Wright *v.* Burchfield, 3 O. 53, 56; Armleder *v.* Lieberman, *supra.*

[11] Collier *v.* State, 20 Ark. 36.

Sec. 603. Communications by jury or jurors with third persons.—The doctrine is immemorial that jurors must not converse with third persons during the progress of a trial. To do so would violate their sworn duty, and such a practice would have a very dangerous tendency, destroying whatever efficiency the jury system now has. The civil and criminal code provides that the officer having charge of the jury shall not suffer any communication to be made to them, nor to make any himself, except to ask them if they have agreed upon their verdict, unless by order of court.[1] This rule has never been essentially departed from, and still it has not and should not be arbitrarily applied, where it is made to appear that no mischief has been done.[2]

Sec. 604. Communications with jury by bailiff.—The statute requires the officer or bailiff having charge of the jury, in both civil and criminal cases, not to suffer any communications to be made to them, nor make any himself, except to ask them if they have agreed upon their verdict, unless the court by special order permits any to be made.[3] After a jury has been impaneled, great vigilance is required that no improper influence or communication be permitted to reach them, and especially is this the case after they have retired to consider their verdict. While the jurors are viewing premises under order of court, no one but the officer placed in charge is allowed to speak to them on the subject of the trial.[4] There is not entire harmony in the adjudications as to what will constitute a harmful communication made by third persons or by an officer, but in all instances such communications are scrutinized with care. It is harmful

[1] R. S., secs. 5192, 5193, 7312.

[2] Bennett *v.* Howard, 3 Day, 219; Hamilton *v.* Pease, 38 Conn. 115. Where a juror said to a witness that "they could throw the costs of the action upon the defendant of course," it was held that although it was a violation of the duty of the juror, as it did not show bias it was not sufficient to grant a new trial. McIlvaine *v.* Wilkins, 12 N. H. 474. The holding of conversations by the jury, while in their room, with persons on the street, in regard to any subject of their deliberations, is in general good cause for setting aside the verdict. Farrer *v.* State, 2 O. S. 54. The fact that the jury in the trial for murder was spoken to at various times during the trial at the hotel where they stopped is not prejudicial where it appears that they were not spoken to about the case. State *v.* Fairlanb, 25 S. W. 895 (Mo.).

A juror separated from his fellows, and privately asked an attorney, in no way connected with the case or parties thereto, "How are we to get along without those books or papers?"—saying, "They have not let us have them." To which the attorney replied, in substance: You must do the best you can; he could give him no advice; that the juror could send up and have the court advise them. Held, although such conduct on the part of the juror was a violation of his duty, yet, as it did not show any bias or prejudice for or against either party, that would effect the verdict, it was not sufficient cause for a new trial. Armleder *v.* Lieberman, 33 O. S. 77. A sick juror may be examined by a physician. State *v.* Town, W. 75.

[3] R. S., secs. 5192, 7312.

[4] R. S., sec. 5191.

or otherwise according to the nature of the case, and each case must be decided according to its effect. For example, where it appears that a bailiff takes part in the deliberations of the jury as if a member, the verdict should be set aside;[1] and so where the bailiff informs the jury that the court may keep them out for a week if they do not agree;[2] and so would it be improper for a bailiff to pass in to the jury-room any books or paper not proper for them to have;[3] so where the bailiff goes into the jury-room and reads to them portions of the instructions;[4] or a communication by the officer as to any portion of the evidence which had been introduced but not allowed to go to the jury.[5] In fact, it may be safely stated as a general rule that a verdict should be reversed or set aside whenever it appears that the bailiff in charge of the jury has communicated with any member of the jury, or performed any act which has in any way influenced the jury in their verdict.[6] And the trial court cannot be too strict in guarding trials by jury from improper influences, and in compelling rigid enforcement of rules tending to preserve purity of such trials. It is, of course, essential that a party desiring to take advantage of any errors in this regard, should make the proper exceptions or objections. But it is not essential that objections to misconduct of an officer of the court should be made at the time, as such irregularities may be brought to the attention of the court upon a motion for a new trial.[7]

Sec. 605. Communications with jury by judge.—A judge of the trial court occupies an attitude towards the jury different from that of any other person. The jury look to him with great respect throughout the trial, and anything that he may say or do will doubtless have great influence upon their verdict. The duty of securing an impartial trial devolves upon the judge, and this cannot be accomplished if the judge has any improper communications with the jury. The rule is well settled, therefore, that no communications whatever should take place between the jury and judge after the cause has been committed to them by the charge of the court, unless in open court, and, when practicable, in the presence of the counsel in the case.[8] The rule is

[1] Barnett *v.* Eaton, 62 Miss. 768.

[2] Obear *v.* Gray, 68 Ga. 182. Also see Wiggins *v.* Downer, 67 How. Pr. 65.

[3] State *v.* Lantz, 23 Kas. 728.

[4] State *v.* Brown, 22 Kas. 222.

[5] State *v.* Wart, 51 Ia. 587.

[6] State *v.* Langford, 45 La. Ann. 1177; Fitzgerald *v.* Goff, 99 Ind. 28.

[7] Danes *v.* Pearson, 6 Ind. App. 465.

[8] Campbell *v.* Beckett, 8 O. S. 211; Cook *v.* Green, 1 Halst. 109; State *v.* Patterson, 45 Vt. 308 (1873); Sargent *v.* Roberts, 1 Pick. 337; Taylor *v.* Belsford, 13 Johns. 487; Read *v.* Cambridge, 124 Mass. 567 (1878); Danes *v.* Pearson, 6 Ind. App. 465.

the same in both civil and criminal cases. In the trial of criminal cases the constitution contemplates that all that may be said and done against the accused should be in the hearing and presence of the public. The court has no right to hold any communication with the jury touching the case, except in the presence of the accused and the public, and cannot secretly communicate to the jury about the law of the case. To permit a judge during the temporary adjournment of the court to go into the jury-room to explain to them what had been the charge of the court, even though the judge does it under a mistaken notion of duty, prostrates the constitutional rights of the accused.[1]

The accused is entitled to have the deliberations of the jury continue undisturbed and uninterfered with, and it is error for the judge, during the enforced absence of the accused, to hold a conversation with the jury which might influence their verdict, and prevent the defendant from having a fair trial in the case.[2] Whenever there is any communication to be made by the court to the jury after the cause has been committed to them, it should be done only in the presence of counsel, or after a full opportunity has been given them to be present. These requirements may, however, be waived by the parties, but unless there is an express waiver, the judge should not make any communications whatever.[3]

Sec. 606. Communications between jurors and parties.—The parties to an action come under the same ban as do third persons with reference to communications with jurors. While a cause is on trial the parties should have no conversation whatever with jurors or in their presence in reference to the case. Nor should they extend any special courtesies to jurors or furnish them in advance with any part of the proof. If either party to a cause tampers with a jury during the trial, or prior to it, there is good cause for setting the verdict aside.[4]

Sec. 607. Communications between jurors.—The law looks with much disfavor upon communications made by jurors to each other, and in some instances holds the jurors guilty of misconduct, which will vitiate the verdict. To substantiate their

[1] Kirk *v.* State, 14 O. 511.

[2] Bennett *v.* State, 10 O. C. C. 84.

[3] Danes *v.* Pearson, 6 Ind. App. 465.

[4] McIntire *v.* Hussey, 57 Me. 493; Cottle *v.* Cottle, 6 Green. 142; Heffron *v.* Gallope, 55 Me. 563; Tucker *v.* Kingston, 5 R. I. 562. Familiar conversation and intercourse between parties interested in the event of the suit and the jury, however innocent, destroys confidence in the impartiality of the verdict, and should be frowned upon by the court. Parties and jurors frequently happen together at hotels and other public places and converse upon indifferent topics, but such conversations have never been considered sufficient, of themselves, to set aside a verdict. Borland *v.* Barrett, 76 Va. 128.

misconduct, however, it must be established upon testimony other than the affidavits of the jurors themselves, as the general rule, founded upon grounds of public policy, does not permit the impeachment of the verdict upon the affidavits or depositions of the jurors themselves.[1] Included within this rule may be classed communications by jurors to their fellow members after their retirement for deliberation upon their verdict touching matters within their own personal knowledge, and partaking of an evidential character affecting or bearing on the issues involved in the cause, contradictory or varying the testimony offered. This will furnish ground for a new trial if it can be made satisfactorily to appear in any manner other than by the affidavits of the jurors themselves.[2] It is hard to conceive, therefore, within the rule, how it can ever be shown that jurors have made improper communications to each other, as the law does not permit the secrecy of their deliberation to be invaded even by the officer in whose charge they are placed. This, of course, does not affect their misconduct by word or deed, which takes place outside of the jury room or in open court. So declarations and utterances of opinions by jurors made outside the court during the pendency of the trial, which implies a strong disposition for or against one side or the other, or indicates a state of mind or feeling which would cause the juror to be unwilling to hear evidence or arguments opposing his opinion, a verdict in accord with such prejudice should be set aside.[3]

So the affidavit of a juror may be received to show that the foreman has announced a verdict different from that agreed upon by the jury, and in such cases some courts hold that the jury should be directed to retire and consider their verdict where the fact of a mistake in the verdict is made to appear, before the same is received and recorded.[4]

Sec. 608. Effect of jurors using intoxicating liquor.—Parties have the right to the cool, dispassionate and unbiased judgment of each juror applied to the determination of the issues involved in a

[1] Kent *v.* State, 42 O. S. 426; Parker *v.* Blackwelder, 7 O. C. C. 140; Holman *v.* Riddle, 8 O. S. 384; Wertz *v.* Rd. Co., 30 W. L. B. 280; 2d Thompson on Trials, sec. 2618; 2 Elliott's Gen. Pr., sec. 949; State *v.* Cuppett, 1 W. L. M. 329; Farrar *v.* State, 2 O. S. 54.

[2] Kent *v.* State, *supra.* See Darrance *v.* Preston, 18 Ia. 396.

[3] State *v.* Carter, 25 W. L. B. 17. The tendency of the human mind is that when one expresses himself publicly as to any fact, theory or judgment they are too apt to stand by their own public declarations in defiance of evidence. Poole *v.* Rd. Co., 2 McCrary, 251. See also Martin *v* State, 25 Ga. 494.

[4] Dalrymple *v.* Williams, 63 N. Y. 361; Farrell *v.* Hennessey, 21 Wis. 632. See Thompson on Trials, sec. 2619, and cases; Elliott's Gen. Pr., sec. 949.

case. If jurors are permitted to indulge in intoxicating liquors, their capacity for cool, deliberate judgment would thus be destroyed. Knowing the subtle and potent influence of the liquor on the brain, no judge for a moment should permit a trial to proceed where a juror is under the influence of liquor, or permit a verdict to stand which is not the deliberate judgment of sober men.[1] For this reason courts are in all cases jealous of the use of intoxicants. There is some conflict, however, as to the effect that the drinking of ardent spirits by jurors may have on their verdict. The mere drinking of spirituous liquors by a juror in a civil case during adjournment of a trial, though censurable, is not regarded as a sufficient reason for setting aside the verdict, unless it really has some influence on the final result of the case.[2] To set aside a verdict, because a juror has taken a single drink of liquor, according to some views, would be giving to verdicts of juries a very dangerous and unnecessary stability.[3] It has been held that the casual treating of a juror by the prevailing party, or one in his employ, without any design to influence him, and the juror is not thus influenced, is not ground for a new trial.[4] According to some authority, the drinking of liquor during trial raises a presumption against the validity of the verdict.[5] But the better view seems to be that whether or not the conduct of a juror in drinking intoxicants materially affects the substantial rights of the party, must be determined by the court upon the facts of each particular case. While this matter must of necessity rest largely in the discretion of the court, it must still be a judicial discretion, controlled by the law affecting the substantial rights of the party.[6] And a verdict rendered by jurors who, during the progress of a trial, have drank intoxicating liquors on the invitation and at the expense of the party who obtains the verdict, should undoubtedly be set aside.[7] The separation of a juror from his fellows in the trial of a criminal case after it has been finally submitted to them, and before they have agreed upon a verdict, for the purpose of obtaining and drinking intoxicating liquors, when not explained or shown to be excusable, is such misconduct of the juror as will entitle the person to a new trial.[8] But where the jury have separated in a civil case by permission of the court after a cause has been submitted, with consent of parties, the mere drinking of liquors by

[1] Perry *v.* Bailey, 12 Kas. 539.

[2] Rd. Co. *v.* Porter, 32 O. S. 328, 332; Perry *v.* Bailey, 12 Kas. 539; Wilson *v.* Abrahams, 1 Hill, 207; Pope *v.* State, 36 Miss. 121.

[3] Perry *v.* Bailey, *supra.*

[4] Rd. Co. *v.* Porter, 32 O. S. 328, 332.

[5] State *v.* Madigan, 59 N. W. 490.

[6] Rd. Co. *v.* Porter, 32 O. S. 328, 332.

[7] Perry *v.* Bailey, 12 Kas. 539; Wilson *v.* Abrahams, 1 Hill, 207; Rowe *v.* State, 11 Humph. 491; Pope *v.* State, 36 Miss. 121; Creek *v.* State, 24 Ind. 151; Bender *v.* Buehrer, 8 O. C. C. 244.

[8] Weis *v.* State, 22 O. S. 486; State *v.* Baldy, 17 Ia. 39.

one of the jurors while thus separated, may not of itself be ground for setting aside the verdict.[1] And where jurors drink liquor while viewing the premises, but do not become intoxicated, and the person furnishing the liquor is in no wise connected with the case, and the jury are in no way influenced to the prejudice of either party, is not sufficient ground to set aside the verdict.[2]

Sec. 609. Reading newspapers.—The code, in its various provisions, while departing from an ancient and useless severity, preserves by its wise and liberal provisions as to the conduct of the jury, and as to its custody during trial, the sense and substance of all that ought to be held sacred in the action of the jury. When the jurors have been guilty of misconduct wholly at variance with these regulations, or if it be a case of the least doubt, a verdict rendered under such circumstances cannot have its proper force and effect. The statute is silent as to the reading of newspaper reports or comments upon the trial, although such conduct comes clearly within its spirit. So where the instructions to the jury have not been written out and do not come within the purview of written instructions, it follows, therefore, that it would be improper for the jurors to obtain without authority of the court and without knowledge or presence of the accused a newspaper containing a report of such instructions, whether accurate or inaccurate.[3] The mere reading of newspapers, however, disconnected with the tiral, will be considered as of no consequence on motion for a new trial.[4] But the jury should not be permitted to read newspapers containing improper comments on the trial of the case before them,[5] though it will not be prejudicial if it appears that they merely read the paper without reading anything regarding the trial,[6] or if the newspaper report contains no comment that could prejudice the defendant.[7] So where a juror had in his possession a newspaper containing articles which might influence his verdict, but does not read them,[8] or where they read newspapers containing accurate account of the evidence,[9] it has been held does not furnish grounds for a new trial.

[1] Larrimer *v.* Kelley, 13 Kas. 78. The drinking of two glasses of beer by a juror during trial, after adjournment of the court, and eleven hours before another session, will not vitiate the verdict. Van Buskirk *v.* Daugherty, 44 Ia. 42.

[2] Sanitary District of Chicago *v.* Cullerton, 147 Ill. 385.

[3] Farrer *v.* State, 2 O. S. 54.

[4] Farrer *v.* State, *supra*, 58.

[5] Palmore *v.* State, 29 Ark. 248.

[6] State *v.* Anderson, 4 Nev. 265.

[7] People *v.* Gaffney, 14 Abb. Pr. (N. S.) 36.

[8] State *v.* Dugan, 52 Kas. 23.

[9] Williams *v.* State, 33 Tex. Crim. Rep. 128.

Sec. 610. Tampering with or corrupting jurors.—Under the common law it was a criminal offense, called embracery, to corrupt or attempt to corrupt or influence the verdict of a jury, and this rule prevails in some States by statute. In Ohio, however, it is only considered as a contempt of court and punishable as such. The question is well discussed by Day, Judge, in the following language:

"That right of the parties in a jury trial to have an impartial and unbiased jury, is a substantial right, cannot be questioned, and it is equally clear that any tampering with jurors during the adjournments of a trial, for the purpose of influencing their decision, where it has that effect, materially affects that right. Moreover, any attempt of a party to corrupt the jurors is an invasion of the other party's right, for he ought not to be subjected to the hazard of having them biased against him, nor to the task of proving that he has been prejudiced thereby, for, from the nature of the case, it might be impossible to be shown otherwise than by the jurors themselves, who, for reasons of public policy, are in general only competent as witnesses to sustain, and not to invalidate their verdict."[1]

And an attempt, therefore, of the prevailing party or his attorney to corrupt a juror by furnishing intoxicating liquors to him or in any other manner, is ground for a new trial whether it is shown to be successful or not, unless it is shown that it was not intended to influence the action of the juror, and that it did not in fact influence his mind as a juror.[2]

Like many other questions affecting the conduct of the jury, it may depend upon the circumstances whether or not acts of parties may fall within the spirit of the rule as to tampering with, or corrupting, juries so as to furnish grounds for setting aside the verdict. This appears to be the rule in the case from which the foregoing quotation has been taken. A verdict should be set aside where it appears that a friend or relative of one of the parties approached a juror and volunteered information regarding the case, although it may not have been done at the request of the party to the suit;[3] and so where one of the parties to a suit entertains a juror before the trial of a case and converses with him about its merits;[4] and so has it been held that where a party attempts to influence a juror or conducts

[1] 32 O. S. 333; Railroad Co. *v.* Porter, 32 O. S. 328.

[2] Ry. Co. *v.* Porter, *supra.* "If the act done was a mere accident, or inadvertence, without any improper design; and if it can be safely assumed that it had no improper influence on the mind of the jurors; in such case there can be no just or reasonable grounds to disturb the verdict." Vaughn *v.* Dotson, 2 Swan. 348. See also Thompson on Trials, sec. 2560 and cases cited.

[3] Bradbury *v.* Cony, 62 Me. 223; Hamilton *v.* Pease, 38 Conn. 115.

[4] McIntire *v.* Hussey, 57 Me. 493.

himself, outside of court, at a place and in a manner calculated to have such influence, the verdict in his favor will be set aside.[1] A verdict, however, will not be set aside where it appears that the party did not know he was addressing a juror and desisted as soon as he ascertained that fact;[2] and the fact that a juror was offered a bribe by a stranger to the suit is not misconduct where the juror swears that he was not influenced thereby.[3]

Sec. 611. Refreshments for jury.—In modern times jurors are treated much differently than formerly with respect to the taking of meals or refreshments during the progress of a trial, and after they have retired for deliberation. In civil cases there is more discretion left to the court, and they may be permitted to separate for the purpose of taking their meals.[4] In criminal cases, however, it being necessary to keep the jury together after they have retired for deliberation, their meals must be taken in a body under charge of an officer.[5] While it is necessary to carefully guard against attempts to invade the sanctity of the jury box, yet the rule cannot be applied so as to do injustice to innocent parties. For instance, where the unsuccessful party is in no manner implicated in any improper relations with the jury, he should not be held responsible.[6] The jury may have refreshments by leave of court in capital cases, and a sick one may be examined by a physician.[7] Where the principal petitioner for a ditch, on a solicitation from the jury while on their view, gives them something to eat, there being no public house near, but no conversation is held with them, and there being no intention to influence the jury, the verdict will not be set aside. The mere fact that one of the jurors in a case at the request of a previous invitation, takes dinner and supper with one of the parties to the suit during the progress of the trial, it has been held, will not vitiate the verdict.[8]

Sec. 612. When jury may view place or property.—The civil and criminal code provides that the court, when of the opinion that it is proper for the jurors to have a view of the property which is the subject of litigation, or the place in which any material fact occurred, may order them to be conducted in a

[1] Allen *v.* Aldrich, 29 N. H. 63.

[2] Wise *v.* Bosley, 32 Ia. 34.

[3] Clay *v.* Montgomery, 102 Ala. 297.

[4] O'Bar *v.* Trammell, 37 Ga. 195; O'Shields *v.* State, 55 Ga. 696. "A jury should be furnished refreshments under direction of the court, and if there is competent evidence that any refreshments were furnished without such direction, it might be a good ground for a new trial." *Id.*

[5] See *ante*, sec. 597.

[6] Eakin *v.* Banking Co., 24 N. J. L. 538.

[7] State *v.* Town, Douglas, 75.

[8] Koester *v.* City of Ottumwa, 34 Ia. 41.

body, under the charge of an officer, to the place which shall be shown to them by a person appointed by the court for that purpose; and while the jurors are thus absent no person, other than the person so appointed, shall speak to them on any subject connected with the trial.[1]

At common law a view by the jury was only taken in certain real actions, and it was upon the theory that they were acting not only as triers of facts, but as viewers, and it was intended that they should thus procure evidence to assist them in arriving at a verdict. The subject is now regulated by statute as above quoted, by which two kinds of views are contemplated. In one case they are to act as viewers,[2] and in the other they are to view the premises solely to enable them to better apply the testimony adduced on the trial, and they should not therefore be instructed to consider the view as evidence in the case.[3] And when they are acting as viewers, as in appropriation or ditch proceedings, they may then consider in evidence facts made known to them personally from an actual view of the premises.[4] Even though the statute authorizes a view to be made by a jury it is regarded by many authorities as discretionary whether it shall be made or not, and the terms of the statute make it so.[5]

The language of the criminal code is held to be broad enough to authorize a jury to be sent anywhere, and no reason is apparent why a jury might not be sent to any place where a material fact occurred, if within the jurisdiction of the State. It authorizes the court to send the jury to a county where the crime was committed when there has been a change of venue.[6]

Where a view is had in a criminal case, it is the well settled rule that it is necessary, under the constitutional provision, that the accused shall have the privilege of meeting his witnesses face to face, that he accompany the jury upon their view, and if he is not given that privilege, error intervenes.

But it is not error for the jury to make a view of the place where a crime has been committed under the order of the court, in the absence of the accused where the privilege has been awarded to him, but has been refused.[8]

[1] R. S., secs, 5191, 5189 (civil cases); 7283 (criminal cases).

[2] R. S., secs. 4467, 4580.

[3] Machader *v.* Williams, 54 O. S. 344; City of Columbus *v.* Bidlinmeier, 7 O. C. C. 136; *cf.* Bender *v.* Buehrer, 8 O. C. C. 224.

[4] Williams *v.* Lockoman, 46 O. S. 416. See Israel *v.* Railway Co., 19 W. L. B. 258. See also as to viewing in ditch proceedings, Miller *v.* Weber, 1 O. C. C. 130.

[5] Machader *v.* Williams, 54 O. S. 344, 346; Leidlein *v.* Meyer, 55 N. W. 367; 95 Mich. 586; Railway Co. *v.* Lea, 41 Ill. App. 584. Also see Thompson on Trials, sec. 883.

[6] Jones *v.* State, 51 O. S. 331.

[7] Holtelling *v.* State, 3 O. C. C. 630; People *v.* Bush, 71 Cal. 602. But see Thompson on Trials, sec. 886.

[8] Blythe *v.* State, 47 O. S. 234.

A juror will be presumed to have obeyed the injunction of the court as to conversing with other persons while upon a view until positive evidence is produced to the contrary.[1]

Sec. 613. Viewing premises for the purpose of witnessing an experiment.—Taking a jury to view the place where the injury occurred for the purpose of witnessing experiments in their presence, with a view of reproducing to their senses, as nearly as may be, the transaction or occurrence, in whole or in part, which is the subject-matter of investigation, has a different purpose than the view taken by them, discussed in the last section. Such experiments serve to put the jury in possession of knowledge, important in the determination of the issues on trial, which cannot be so readily or accurately obtained from the testimony of witnesses. This question has been recently considered by our supreme court and the conclusion, in an action against a railroad for negligence, was reached that: "Where, on the trial of an action, the railroad was permitted, at its request, with the consent of the plaintiff, and in pursuance of an order of court procured by it, to make experiments in the presence of the jury, by the running of a train over the crossing where the plaintiff's intestate was killed, and under conditions practically the same as those which existed when the accident occurred, for the information of the jury as to the nature and cause of the accident, the information so obtained was competent evidence for the consideration of the jury, and an instruction to that effect was not erroneous.[2] It is probably questionable as to whether or not such an order may be made by the court without the consent of the parties. But it would seem entirely proper to make such experiments as may be done in the courtroom in the presence of the jury.[3]

Sec. 614. Remarks of court.—On account of the peculiar relations existing between the judge and the jury[4] and the influence which he has over them, great care should be exercised by the judge that no improper remarks shall be made by him which will in any way disclose his opinion or judgment in favor of either side. Because of that influence a rule prevails that, whenever he expresses an opinion on disputed facts, or as to the character of witnesses, or compliments an attorney at the expense of another, or uses language which tends to bring an attorney into contempt before a jury, or uses any language prejudicial to either side, there is error for which the verdict should be set aside.[5] Observations or remarks made by a judge

[1] Marsh *v.* Commissioners, 27 W. L. B. 56.

[2] Schweinfurth *v.* Railway Co., 60 O. S. 215.

[3] See 2 Jones on Ev., sec. 395; Taylor on Ev., p. 365.

[4] *Ante*, sec. 605.

[5] McDuff *v.* Journal Co., 84 Mich. 1.

will necessarily be of slight importance when there is no prejudice resulting therefrom, and will not warrant granting a new trial unless it is reasonably certain that the interests of the parties have been prejudiced and a fair trial prevented.[1]

The question must depend, therefore, upon the character and effect of the remarks. As for example, he should not intimate that a witness has not answered fairly;[2] and that he thinks the witness is doing the best he can in the matter;[3] nor make remarks tending to embarrass both witness and counsel;[4] nor should he intimate his view of the testimony when admitting it, or reflect on the veracity of a witness;[5] nor make remarks during the progress of the trial in the presence of the jury, commenting on the evidence;[6] or criticise the testimony of a witness.[7]

While it is the duty of the court to maintain proper decorum during its session, and may censure counsel in the presence of the jury, yet the judge should not use harsh or censorious language to him, in relation to what he may have done;[8] nor should he remark to counsel that he is pursuing an indecent course in a trial.[9]

A remark by a judge, with apparent impatience, during the examination of a witness that: "These witnesses have come here for a purpose, and they are going to swear to it. What is the use of fooling about it? It don't amount to anything," was held to be prejudicial.[10]

Remarks by the judge in the presence and hearing of the jury as to the inaccuracy of reports of testimony before a coroner, when such a report is about to be offered in evidence, were held to be prejudicial and ground for a new trial.[11]

A remark explanatory of reasons for admitting testimony which is not expressive of an opinion is not objectionable.[12]

Sec. 615. Sending papers to jury.—The rules of practice as to what papers may or may not be sent to the jury when they retire for deliberation upon their verdict, are well defined. It is a matter of considerable importance, as the possession of

[1] Wheeler *v.* Wallace, 53 Mich. 355; Hill *v.* Corcoran, 15 Colo. 270; Little *v.* State, 75 Tex. 616; Railroad Co. *v.* Palmer, 15 S. E. 34; 89 Ga. 161.

[2] Chicago City Ry. Co. *v.* McLaughlin, 40 Ill. App. 496.

[3] Graham *v.* McReynolds, 90 Tenn. 673.

[4] Darrow *v.* Pierce, 51 N. W. 813; 91 Mich. 63.

[5] People *v.* Hare, 57 Mich. 505.

[6] Brunker *v.* Cummins, 32 N. E. 732; 133 Ind. 443.

[7] Sterling *v.* Callahan, 94 Mich. 536.

[8] Friemark *v.* Rosenkraus, 51 N. W. 557 (Wis. 1894).

[9] McIntosh *v.* McIntosh, 44 N. W. 592; 79 Mich. 198 (1890).

[10] Rose *v.* State, 13 O. C. C. 342, 353.

[11] P. C. G. & St. L. *v.* Burroughs, 6 Oh. Dec. 527.

[12] Reid *v.* Sycks, 27 O. S. 285, 288.

some papers or documents may be very prejudicial. It is usual for the court to direct counsel on both sides to see that the proper papers, documentary evidence and exhibits are taken by the officers to the jury-room, and it is the duty of counsel, whether so directed by the court or not, to see that this is done. In the absence of fraud or artifice, therefore, a verdict will hardly be disturbed because incompetent evidence or improper papers may have fallen into the hands of the jury when counsel have neglected their duty in this behalf.[1] Nor indeed will a verdict be set aside unless the papers which have been improperly taken to the jury-room have in fact, in some manner, been prejudicial to the interest of one of the parties,[2] although this rule is not universal. It has been held in Nebraska that where a paper has been incidentally or otherwise taken into the jury-room, where it remains in the hands of the jury during their deliberation, it is fair to assume, unless definitely shown to the contrary, that the same was considered by the jury, and its admission to the jury-room is prejudicial and cause for setting the verdict aside.[3] It is a matter of discretion with the court to determine what papers shall be taken by the jury into their room on their retirement.[4] Where it is made to appear that the jurors did not see or examine papers which have improperly been taken to their room, the verdict should not be interfered with.[5]

Before questions connected with the sending to the jury of papers can be considered by a reviewing court it is necessary that objections be properly made at the time,[6] and that the action of the court shall be shown by a bill of exceptions.[7] The question cannot be made for the first time upon proceedings in error.[8] Nor can the objections be raised for the first time after the verdict if counsel *knew* that the papers were taken by the jury when they retired.[9] What papers may or may not be taken to the jury-room will be considered in later sections, but it may here be stated that a p at which has been admitted in evidence,[10] or a model which has been used by witnesses for the purpose of explaining their testimony,[11] may be sent to the jury;

[1] Gardner *v.* Kimball, 58 N. H. 202; Tabor *v.* Judd, 62 N. H. 288.

[2] Jaspers *v.* Mallon, 11 W. L. B. 166; Railway Co. *v.* Schneider, 45 O. S. 699–700. Where the jury take papers or other matters not part of the evidence to their room, and consider it in forming their verdict, it should be set aside if it causes prejudice, but otherwise not. Thompson on Trials, sec. 2580, and cases.

[3] LaBonty *v.* Lundgren, 59 N. W. 904; 41 Neb. 312.

[4] Railroad Co. *v.* McCarney, 12 O. C. C. 543.

[5] Fulton Co. *v.* Philips, 91 Ga. 65.

[6] Posey *v.* Patton, 109 N. C. 455; Zeibold *v.* Foster, 118 Mo. 349.

[7] Bank *v.* Williams, 4 Ind. App. 501.

[8] Posey *v.* Patton, *supra.*

[9] Zeibold *v.* Foster, *supra;* Gardner *v.* Kimball, *supra;* Tabor *v.* Judd, *supra.*

[10] Railway Co. *v.* Schneider, 45 O. S. 678.

[11] Illinois Silver Mining Co. *v.* Raff, 34 Pac. 544.

and the fact that a memoranda made by a counsel appears on the book of a plat which goes to the jury cannot be considered prejudicial when it appears that it was so dim that it could hardly be read.[1] But it is error to send with the jury a calculation of their damages based upon conditions which were disputed questions to be determined only by the jury.[2]

Sec. 616. Sending documentary evidence to jury.—The practice appears to be that where documentary evidence has been duly proven and admitted in evidence, and its authenticity is unquestioned, and there is no testimony contradicting it, that the court may within its discretion allow it to be taken to the jury-room, although objection is made;[3] and it will not, therefore, be error for the court to refuse to send such evidence out with the jury.[4] A drawing or sketch introduced and admitted in evidence may be taken by the jury,[5] or a claim upon which a suit is based which states part of the complaint, and which has been received in evidence.[6]

Sec. 617. Sending pleadings and papers to jury-room.—It is the duty of the court to specifically state in its instructions to the jury what the issues involved in the case are, and it would therefore be a dangerous practice to require the pleadings to be sent to the jury and leave it to them to determine what matters were admitted therein and what were not. If the pleadings contain admissions which the parties are entitled to have considered by the jury, the question should be settled by an instruction by the court.[7] While it is the duty of the court to point out to the jury the issues involved as shown by the pleadings, yet it appears to be the practice in some jurisdictions to permit the jury to take the pleadings to their room, and this is held not to be error.[8] And in the absence of an improper use of them or prejudicial results, a case will not be reversed on that ground.[9] In the absence of objection until after the verdict, it is not error to send to a second jury trying a cause on a second trial, a copy of the indictment upon which is written the verdict of guilty by the first jury.[10] There can be no ground of complaint in such case

[1] Railway Co. *v.* Schneider, 45 O. S. 678.

[2] Himes *v.* Kiehl, 154 Pa. St. 190.

[3] Tubbs *v.* Ins. Co., 84 Mich. 646; McLain *v.* Crow, 88 Cal. 644; Wood *v.* Wood, 47 Kas. 617; Thompson *v.* McEwen, 24 Kas. 757.

[4] Osburn *v.* State, 7 Oh., Part 1, 212; Jackson *v.* Pittsburg Times, 152 Pa. St. 406.

[5] Railway Co. *v.* Schneider, 45 O. S. 678, 699.

[6] McClain *v.* Crow, 88 Cal. 644.

[7] Spaulding *v.* Saltiel, 18 Colo. 86.

[8] Zeibold *v.* Foster, 118 Mo. 349; State *v.* DeLong, 12 Ia. 453; Thompson on Trials, sec. 2582.

[9] Bluedorn *v.* Railway Co., 121 Mo. 258.

[10] Forbes *v.* Commonwealth, 90 Va. 550.

if the jury make affidavit that the verdict was not seen or commented on by any of them, or that they did not know of its existence there.[1] The fact that the jury on the trial of a claim against an estate takes such claim with them on their retirement without the consent of the parties, is not such an irregularity as will work a reversal of the judgment [2]

Sec. 618. Sending depositions to the jury.—By the English practice, and so in many States, it is well known, depositions are never sent to the jury. The theory upon which they were excluded is that where part of the evidence is oral and part written, there would be an undue advantage obtained by having opportunity of reading the depositions in the jury-room, while they have only their recollection as to the oral evidence. It is unnecessary to refer to authorities. Those caring to pursue the question may find them by the reference in note.[3] A different practice has, from a very early day, prevailed in Ohio, upon the theory that having possession of the depositions enables the jury to refresh their recollection of the testimony without danger of being misled, and it at once settles all differences among them as to what the testimony actually was, so far as it may be contained in the depositions. It is, therefore, the general rule in Ohio, that depositions read in evidence may be sent to the jury on their retirement.[4]

Where depositions to which there are no exceptions or objections on the ground that they, or any part of them are irrelevant, or incompetent, are offered in evidence and read to the jury on the trial of the case, unless there is some special reason why it should not be done, it is the right of the party offering them, under the decisions of the State, to have them sent to the jury on their retirement. And in such case a refusal of the court to allow this to be done, when properly applied for, and an exception is duly taken to such ruling, is error, for which the judgment should be reversed.[5]

But where the depositions contain evidence which has been ruled out by the court as incompetent, and the same is incapable of separation from the remainder without mutilating the deposition, it would be plainly improper to send the rejected evidence where it might be perused by the jury. Hence, the court may in its discretion refuse to allow such depositions to go to the jury.[6] But if they should be sent to the jury with special notice to counsel, who makes no objections, there can be no complaint.[7]

[1] Railway Co. *v.* Hill, 7 Ind. App. 255.
[2] Avery *v.* Moore, 133 Ill. 74.
[3] Thompson on Trials, sec. 2578.
[4] Stites *v.* McKibben, 2 O. S. 588; Post *v.* Gazlay, 1 C. S. C. R. 105.
[5] Greene *v.* Davis, 4 O. C. C. 84.
[6] Stites *v.* McKibben, *supra;* Kent *v.* Tyson, 20 N. H. 121.
[7] Kent *v.* Tyson, 20 N. H. 121.

Sec. 619. Sending books to jury-room.—As the jurors have nothing to do with the law of a case, law books[1] should not be sent to them, though it has been held that where the judge presiding at the trial of a prisoner for murder, sends to the jury at their request, in the absence of the prisoner, a copy of the statute of the State calling their attention to provisions relating to homicide, there was a proper exercise of discretion not prejudicial or ground for a reversal of the judgment.[2] And as books of science cannot be used by counsel in argument,[3] they should not be sent to the jury.[4] Whether the jury should be allowed to take to their room the account books of a partnership, is a question resting largely in the discretion of the court, about which there can be no complaint unless there has been an abuse of discretion.[5]

Sec. 620. Sending instructions of court to the jury.—The code requires that all written charges and instructions in civil and criminal cases shall be taken by the jurors in their retirement and returned with their verdict into court.[6] If parties desire a charge to be in writing, a request therefor must be made before the argument to the jury is commenced.[7] The object of this requirement probably is to give the court time and opportunity to reduce its charge to writing during the progress of the argument, and thus save delay. The court is only required to reduce such instructions to writing as are properly requested in accordance with the code before the argument. If, therefore, after an oral instruction has been given, special instructions are given by request, the court is not required to permit such special instructions to go to the jury.[8]

So, if no request is made within the time specified—before argument—for written instructions, but the court voluntarily does reduce its instructions to writing, whether or not such instructions may be required and be taken by the jury, does not appear to have been decided by the supreme court. But upon principle it would seem that the parties would not have the right, not having requested written instructions, to have such instructions sent to the jury. The code does not seem to require that such instructions be sent to the jury. And this has, with n the knowledge of the author, been the practice of some trial courts. And this has been so decided by the circuit court.[9]

[1] Harrison *v.* Hance, 37 Mo. 185; Newkirk *v.* State, 27 Ind. 1.

[2] Gondolfo *v.* State, 11 O. S. 114; Graves *v.* State, 63 Ga. 740; Merrill *v.* Nary, 10 Allen (Mass.) 416; People *v.* Gaffney, 14 Abb. Pr. (N. S.) 36.

[3] *Post*, sec. 644.

[4] State *v.* Gillick, 10 Ia. 98.

[5] Wood *v.* Wood, 47 Kas. 617; Thompson *v.* McEwen, 24 Kas. 757.

[6] R. S., secs. 5190, 7300.

[7] R. S., secs. 5190, 7300.

[8] Griffin *v.* State, 34 O. S. 299, 303.

[9] P. & L. E. R. R. Co. *v.* Bishop, 13 O. C. C. 380. As to written instructions, see generally Thompson on Trials, sec. 2583.

If parties agree that such charge should go to the jury, still the court may possibly refuse, as the code only requires the regularly requested charges to be sent to the jury.

Sec. 621. Court may give jury its recollection of testimony, when.—The code provides that after the jury have retired for deliberation, if there be a disagreement between them as to any part of the testimony, the court may give its recollection as to the testimony on the point in dispute, in the presence of, or after notice to, the parties or their counsel.[1] Hence, it would be improper for the court to perform this function in the absence of the parties or their counsel the same as if it were to give further instructions to the jury when they desired to be informed as to any part of the law arising in the case.[2] And likewise where the parties and their counsel are notified, but fail to attend, it cannot be considered error for the court to give its recollection of the testimony in accordance with this provision.[3] This provision of the code applies to both civil and criminal cases.[4] Under the present practice the testimony in the trial courts is taken by a stenographer in almost every case, so that neither the court or counsel burden their minds with the details thereof. And because of the fact that stenographic reports of the testimony are liable to be more correct than the judge's recollection thereof, the practice prevails that when the jury, after retiring for deliberation, disagree as to any part of the testimony, the testimony upon the point upon which the disagreement arises is read by the official reporter of the testimony. And it has been held that while this practice may not be strictly correct, yet it is certainly within the spirit, if not within the letter of the statute. The court announcing this view, incidentally remarked that the practice should not be encouraged, and a judgment will not be reversed for that cause.[5] Yet it seems that this practice is highly proper, and clearly fulfills the requirements of the code, and is much more reliable than the court giving its recollection. The stenographer is a regularly qualified official of the court appointed in pursuance of the statute enacted for that purpose, and there can be no valid objection to pursuing this course.

Sec. 622. May the judge urge or coerce agreement by the jury.—The trial court is vested with very large discretion as to how long a jury shall be kept out when they do not readily agree

[1] R. S., sec. 5194.

[2] Campbell *v.* Beckett, 8 O. S. 211; Salomon *v.* Reis, 5 O. C. C. 375.

[3] *Id.* Emery *v.* Whitaker, 2 C. S. C. R. 36. See also Milus *v.* Marsh, 1 Disn. 512; Preston *v.* Bowers, 13 O. S. 1.

[4] Hulse *v.* State, 35 O. S. 421.

[5] Darner *v.* Daggett, 35 Neb. 695; Jameson *v.* State, 25 Neb. 185.

upon a verdict, and yet in the exercise of this discretionary power the court should, on account of the peculiar relations existing between court and jury,[1] move cautiously, so as to not infringe upon the province of the jury, or in the slightest degree influence them in the formation of their verdict. The court may detain the jury for the purpose of urging them to agree for any length of time that common sense may dictate; and the judge may, in a reasonable manner, urge and exhort the jury to agree, and, indeed, this is his duty.[2] When the jury report that they cannot agree, the judge may send them out for further deliberation, and urge them to use all reasonable efforts to come to an agreement, giving as a reason that the case is an expensive one to try.[3] The court may properly say to the jury that it is of great importance that a verdict be secured, and that while it had no means of knowing how they stood, if there should be one or two men who were unable thus far to reconcile their views with those held by their associates, it would be worth their while for them to consider in view of the fact that so many jurors equally as honest and of as good judgment, took an opposite view, whether they were not mistaken, but that they are not called upon to surrender any conscientious views which they may hold of the case in order to reach a verdict.[4]

It would be improper for the court to say to the jury: "Gentlemen, how do you expect this case to be decided unless you do it? This is, as you know, the third trial of this case, and it has become an incubus upon the business of the court. You must decide it. It is no credit to a man merely because he has an opinion to stubbornly stick to it."[5] And so it would be improper for the court to say: "If you can't get exactly what you want, get the next best thing to it."[6]

Sec. 623. Misconduct of jury—How taken advantage of.—Misconduct on the part of the jury which improperly influences its verdict is ground for setting the same aside. But if it clearly appears that it has no improper effect the verdict should stand.[7] Misconduct of one juror in some sense affects the conduct of all the members of the jury, and the proper administration of jus-

[1] See sec. 605.

[2] Willson *v.* Manhattan Ry. Co., 20 N. Y. S. 852; White *v.* Calder, 35 N. Y. 183; Green *v.* Telfair, 11 How. Pr. 260; Erwin *v.* Hamilton, 50 How. Pr. 32; Watson *v.* Railway Co., 55 N. W. 742; 53 Minn. 551.

[3] Watson *v.* Railway Co., *supra.*

[4] Gibson *v.* R. R. Co., 55 Minn. 177 See also McNulty *v.* Stewart, 12 Minn 434.

[5] Randolph *v.* Lampkin, 90 Ky. 551 (1890).

[6] Southern Insurance Co. *v.* White, 58 Ark. 277.

[7] Armleder *v.* Lieberman, 33 O. S. 77.

tice.[1] It is said that if the natural inference to be drawn from the misconduct of a juror is prejudicial to the party complaining, prejudice will be presumed in the absence of a showing to the contrary.[2] This is putting it rather strongly; it seems that it must appear that the misconduct has some effect.

The various matters with reference to misconduct of a jury have been discussed in this chapter. Where counsel is aware of the misconduct he should call the attention of the court thereto immediately. And it has been held too late to do so after verdict.[3] It would seem, however, if attention was called thereto in a motion for a new trial, for the first time, it would be sufficient. That is one of the grounds for a motion for a new trial.[4] There are some matters which it may not be possible for the court to correct even if attention be called thereto at the time.

[1] Alm *v.* Andrews, 9 O. C. C. 591, 595.
[2] *Id*
[3] Gable *v.* Toledo, 16 O. C. C. 515.
[4] Code, sec. 5305.

CHAPTER XXIX.

DISCHARGING JURY BEFORE VERDICT.

SEC.
624. Of the power to discharge the jury.
625. Jury may be discharged before verdict for what reasons—In civil cases.
626. Jury may be discharged before verdict for what reasons—In criminal cases.
627. Discharge of jury in criminal cases without consent of accused.
628. Record must show cause for discharge.
629. Discharge of jury when verdict complete—Civil cases.

SEC. 624. Of the power to discharge the jury.—The power of the trial court to discharge a jury after it is impaneled and before a verdict is rendered, is well defined. It is a most responsible trust, and should be exercised with great care and caution. The court is vested with a discretionary power in both civil and criminal causes to discharge a jury. In criminal cases this may be done, the prosecution continued and the prisoner remanded for another trial on the same indictment. But this power, though discretionary, must be exercised in accordance with known rules and only under very extraordinary and striking circumstances.[1] While the power is in a large measure discretionary, it is not an arbitrary discretion, but legal, and the action of the court in discharging a jury is nevertheless subject to control and review. If the court in a criminal cause discharges a jury without sufficient cause the prosecution is at an end.[2]

SEC. 625. Jury may be discharged before verdict for what reasons—In civil cases.—The code provides that the jury may be discharged by the court on account of the sickness of a juror, or any accident or calamity requiring its discharge, or by consent of both parties, or after the jurors have been kept together until it satisfactorily appears that there is no probability of their agreeing.[3] The power to be exercised by the court under this

[1] Dobbins *v.* State, 14 O. S. 500; 2 Gall. 364. "The power," said Justice Story, "ought to be used with the greatest caution, under urgent circumstances, which would render it proper to interfere." United States *v.* Perez, 9 Wheat. 580. "I am of opinion," said Spencer, C. J., "that although the power of discharging a jury is a delicate and highly important trust, yet that it does exist in cases of extreme and absolute necesssity." People *v.* Goodwin, 18 John. 187. See also Ladd *v.* State, 5 O. C. C. 276. State *v.* McKee, 1 Bailey, 51. The rule was first recognized in Ohio in Hurley *v.* State, 6 Ohio, 399.

[2] Dobbins *v.* State, 14 O. S. 500.

[3] O. Code, (Whittaker's), sec. 5195.

provision must of necessity be in a large measure discretionary, subject to control for an abuse thereof.

All errors are waived when a jury is dismissed by consent of parties.[1]

Sec. 626. Jury may be discharged before verdict for what reasons—In criminal cases.—The criminal code likewise provides that the court may discharge a jury, without prejudice to the prosecution, for the sickness of a juror, the corruption of a juror, or other accident or calamity, or because there is no probability of the jurors agreeing, and the reason for the discharge shall be entered on the journal.[2] When the jury is discharged on the ground that they cannot arrive at an agreement, it must appear that they have considered the case for such a length of time as to leave no reasonable expectation that they will ever be able to agree upon a verdict.[3] If it appears that one of the jurors, after the jury has been duly impaneled, is in fact disqualified from acting, but that he did not disclose this fact at the proper time, and the defendant himself makes an objection on this account, and the jury is thereupon for that reason discharged as the necessary result of the objection of the defendant, it will not operate as an acquittal.[4] The jury may be discharged when an objection is made to the admission of evidence upon the ground that the indictment does not charge an offense, if the court so holds. The jury should be discharged in such case without rendering a verdict, and there being no offense charged there could be no acquittal.[5]

Sec. 627. Discharge of jury in criminal cases without consent of the accused.—When a jury has been impaneled and the trial has proceeded, a defendant has the right to demand such a disposition of the case, either by verdict or otherwise, as would bar another prosecution for the same crime. If for any reason the same be stopped, either by a *nolle prosequi*, or a discharge of the jury, without an absolute necessity therefor, and such action is taken without consent of the accused, it will operate as an acquittal, and bar any further or subsequent prosecution for the same cause. To hold otherwise would be to contravene the constitutional guaranty against being twice

[1] Wells *v.* Martin, 1 O. S. 386.

[2] R. S., sec. 7313. The power exercised by the court in such cases is founded on legal discretion, governed by known rules and fixed principles, and may be reviewed on error. Dobbins *v.* State, 14 O. S. 493. See *ante*, sec. 624.

[3] Dobbins *v.* State, 14 O. S. 493; Hurley *v.* State, 6 O. 399; Poage *v.* State, 3 O. S. 229.

[4] Stewart *v.* State, 15 O. S. 155.

[5] State *v.* Brown, 47 O. S. 102.

put in jeopardy for the same offense.[1] But if the jury is discharged without grounds at the instance of the accused himself, or by his consent, it does not in that event affect the right of further prosecution by the State.[2]

Sec. 628. Record must show cause for discharge.—The criminal code provides that the record must show the cause or ground upon which a jury is discharged.[3] There is no such provision in the civil code. This rule is not so stringent as to require the record to show a case of necessity, or that it will otherwise operate as an acquittal of the accused. "The urgent necessity must exist," says Judge Ranney, "and must be found by the court, before a jury once sworn in a criminal case, can be discharged without having rendered a verdict," yet it is not essential that all the facts and circumstances upon which the finding is predicated appear in the record. As the order of discharge materially affects the legal rights of the accused, and as a discharge without sufficient reason is in effect an acquittal, it must appear from the record, to justify holding him to a further trial, that an obstacle which the law will recognize as a necessity, did in fact exist; that it engaged the attention of the judge, and that his order was based thereon, and was the result of consideration and decision. If any further statement is desired, it may be made to appear by a bill of exceptions, in which all the facts and circumstances are set forth.[4] It has been held that where the journal entry recites that "afterwards came the said jury into open court and state that they are unable to agree upon a verdict, whereupon they are by the court discharged from further consideration of this case, and the case is passed," there is not sufficient reason shown for the discharge of the jury, and it not appearing that it was with the consent of the defendant, or that the question of the necessity for the discharge of the jury had engaged the attention of the court, or that such order was the result of consideration, the discharge of the jury under such circumstances operates as a discharge of the defendant from further prosecution of the case.[5] If the discharge was upon sufficient ground, but the order of court was not properly entered upon the journal, it may be made by a *nunc pro tunc* entry, at a subsequent term, upon proof of the facts, or on the personal knowledge of the court.[6]

[1] Hines *v.* State, 24 O. S. 134; Mount *v.* State, 14 O. 295; Baker *v.* State, 12 O. S. 214; Dobbins *v.* State, 14 O. S. 493; Stewart *v.* State, 15 O. S. 159-60; Poage *v.* State, 3 O. S. 229.

[2] Stewart *v.* State, 15 O. S. 160.

[3] R. S., sec. 7313. The reason for the discharge shall be entered upon the journal. Poage *v.* State, 3 O. S. 239.

[4] Dobbins *v.* State, 14 O. S. 500; Hines *v.* State, 24 O. S. 134; Ladd *v.* State, 5 O. C. C. 276.

[5] Ladd *v.* State, 5 O. C. C. 276.

[6] Ladd *v.* State, *supra.*

Sec. 629. Discharge of jury when verdict complete—Civil cases.—If no disagreement be expressed, and neither party require the jury to be polled, or, on the polling, each juror answer in the affirmative, the verdict is complete, and the jury shall be discharged.[1]

[1] O. Code, (Whittaker's) sec. 5199

CHAPTER XXX.

ARGUMENT OF COUNSEL.

SEC.
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SEC. 630. General view of the right of argument.—It hardly seems necessary to discuss at great length the right of argument for any practical purpose, as it is well defined and understood. Still the subject cannot be passed for that reason, and as it has been so well and thoroughly considered in a number of cases, an epitome thereof will be given in this section. It is an absolute right of parties in cases, civil and criminal, to be heard by counsel in argument to the jury. In civil cases, however, the right of argument according to the general view, is limited to cases where there is a controverted question of fact to be submitted to the jury for determination.[1] In cases, however, where there is no disputed material fact for the jury to pass upon, the court may then very properly refuse to permit counsel to address them. This will necessarily arise in cases where the court finds it necessary to direct a verdict.[2] So far as concerns the right itself, there is no discretionary power vested in the court.[3]

In criminal cases, however, the constitution guarantees to the accused the right to appear and defend in person and with counsel. But this guaranty is not inconsistent with the existence of power in the court to regulate the exercise of the right by

[1] Douglass *v.* Hill, 29 Kas. 527 (1883); Houck *v.* Gue, 30 Kas. 113 (1890).

[2] Neidig *v.* Cole, 13 Neb. 39 (1882); Harrison *v.* Park, 1 J. J. Marsh, 170.

[3] Douglass *v.* Hill, 29 Kas. 527; Houck *v.* Gue, *supra;* Dille *v.* State, 34 O. S. 617.

reasonable rules and limitations. The constitutional guaranty includes arguments addressed to the court as well as those addressed to the jury. The language of the constitution is: "In any trial, in any court, the party accused shall be allowed to appear and defend in person and with counsel." Courts are established for the purpose of administering justice. To insure the accomplishment of this object and prevent abuse, it is essential that courts should exercise a superintending control over the argument of causes before them. The power, it is true, may be abused, and if it should be, it would constitute good ground for a new trial. The exercise of the power against a party charged with a grave criminal offense is certainly a matter of delicacy, and should be governed by prudence and caution.[1]

It is a most valuable right to be represented by learned and eloquent counsel before the court upon the law and before the jury as to facts. It matters not whether the same is simple or complex, the legal right nevertheless exists. If the court may deny the privilege upon the assumption that the case is too plain for argument, then the exercise of the privilege stands, not upon the legal right, but upon the misconception or caprice or arbitrary volition of the court.[2] While the right is absolute, its exercise may be regulated by the court. The court has no discretionary power over the right itself. It cannot prevent a party in a civil case, except where there is no disputed material fact to be submitted, nor an accused in a criminal case from being heard, even though the evidence be clear, unimpeached and conclusive.[3] While the law will protect counsel in the largest and most liberal freedom of speech, and allow very considerable latitude, yet, as the privilege may be abused in various ways, courts may prescribe certain limitations. It is difficult, however, to define with accuracy the limits which should be placed on counsel in their arguments. The subject, in a general way, has been so well discussed in several cases, that it seems justifiable to give them in the appended note.[4]

[1] Weaver *v.* State, 24 O. S. 586; Dille *v.* State, 34 O. S. 617.

[2] Fareira *v.* Smith, 22 N. Y. Supp. 939.

[3] Dille *v.* State, 37 O. S. 617, 620.

[4] "The largest and most liberal freedom of speech is allowed to counsel, and the law protects him in it. The right of discussing the merits of the cause, both as to the law and facts, is unabridged. The range of discussion is wide. He may be heard in argument upon every question of law. In his address to the jury, it is his privilege to descant upon the facts proved or admitted in the pleadings; to arraign the conduct of parties; impugn, excuse, justify or condemn motives so far as they are developed in evidence; assail the credibility of witnesses, when it is impeached by direct evidence, or by the inconsistency or incoherence of their testimony, their manner of testifying, their appearance on the stand, or by circumstances. His illustrations may be as various as the resources of his genius; his argumentation as full and profound as his learning can make it; and he may, if he will, give play to his wit, or wings to his imagination.

The statements of counsel are not evidence; the court is bound so to instruct the jury, and also that they are sworn to render their verdict only according to the evidence. Yet the necessary effect is to bring the statements of counsel to bear upon the verdict with more or less force, according to circumstances; and if they, in the slightest degree, influence the finding, the law is violated, and the purity and impartiality of the trial tarnished and weakened. If not evidence, then manifestly the jury have nothing to do with them, and the advocate has no right to

To his freedom of speech, however, there are some limitations. His manner must be decorous. All courts have power to protect themselves from contempt, and indecency in words or sentiments is contempt. . . . No court can command from an enlightened public that respect necessary to an efficient administration of the law, without maintaining in its business proceedings, that courtesy, dignity and purity, which characterizes the intercourse of gentlemen in private life." Tucker *v.* Henniker, 41 N. H. 321 (1860), per Fowler, J.

"It is a most valuable right to be represented by learned and eloquent counsel, not only before the court, as to the law, but also before the jury as to the facts. It means something—it is a guarantee against the encroachment of power upon the personal rights of the citizen. It is in this country no mean privilege. The privilege is valuable, because the jury may look to the argument of counsel, may consider his reasoning before making up their verdict. His business is to comment on the evidence—to sift, compare, and collate the facts—to draw his illustrations from the whole circle of the sciences—to reason with the accuracy and power of the trained logician, and enforce his cause with all the inspiration of genius, and adorn it with all the attributes of eloquence. It is the business of the jury to listen, to be informed, but not to obey. They sit, the sworn arbiters of the cause, bound by the most solemn sanctions, to do justice between the parties according to evidence." Garrison *v.* Wilcoxson, 11 Ga. 154, Nisbet J.

"It is essential to the proper administration of justice, frail and uncertain at the best, that all that can be said for each party, in the determination of fact and law, should be heard. Forensic strife is but a method, and a mighty one, to ascertain the truth and the law governing the truth. It is the duty of counsel to make the most of the case which his client is able to give him; but counsel is out of his duty and his right, and outside of the principle and object of his profession, when he travels out of his client's case and assumes to supply its deficiencies. Therefore is it that the nice sense of the profession regards with such distrust and aversion the testimony of a lawyer in favor of his client. It is the duty and right of counsel to indulge in all fair arguments in favor of the right of his client; but he is outside of his duty and his right when he appeals to prejudice irrelevant to the case. Properly, prejudice has no more sanction at the bar than on the bench. But an advocate may make himself the *alter ego* of his client, and indulge in prejudice in his favor. He may even share his client's prejudice against his adversary, as far as they rest on the facts in his case. But he has neither duty nor right to appeal to prejudice, just or unjust, against his adversary, *dehors* the very case he has to try. The very fullest freedom of speech within the duty of his profession should be accorded to counsel; but it is license, not freedom of speech, to travel out of the record, basing his argument on facts not appearing, and appealing to prejudice irrelevant to the case and outside of the proof. It may sometimes be a very difficult and delicate duty to perform to confine counsel to a legitimate course of argument. But, like other difficult and delicat. duties, it must be performed by those upon whom the law imposes it. It is the duty of the circuit courts, in jury trials, to interfere in all proper cases of their own motion. This is due to truth and justice. And if counsel persevere in arguing upon pertinent facts not before the jury, or appealing to prejudice foreign to the case in evidence, exception may be taken by the other side, which may be good grounds for a new trial, or

make them.[1] It is matter of discretion for the judge to determine when he will hear counsel, and he can say, as is frequently done, that he does not wish to hear from one until the argument of the other has raised a doubt in his mind.[2]

Sec. 631. The number of counsel may be limited.—The question whether the court may, in the exercise of its discretionary power over the argument of counsel, limit the number of counsel who shall speak, has been considered to a limited extent, and the rule involved seems to be that when parties whose interests are similar, or when one party to a suit is represented by more than one counsel, that the court may very properly, in the exercise of its discretion, limit the number who shall address the jury without infringing upon the right of argument.[3]

Where there are several parties to a suit whose interests are dissimilar, and who are consequently represented by different counsel, each are entitled to be heard in argument, and the

for a reversal in this court." Browne *v.* Swineford, 44 Wis. 293.

"It is exceedingly difficult to lay down a rule, beyond which counsel shall not be allowed to travel in argument. Illustrations, analogies, inferences from facts proved, and in many cases, from failure to introduce proof, or to explain suspicious conduct, when it appears reasonable that such explanatory fact could be proven, if it existed, are legitimate subjects of comment and argument. Courts should not be severe in arresting such argument, on the ground that, to their minds, the analogy or inference is forced or unnatural, or that the argument employed is illogical. When necessary that function can be better performed in the charge to the jury." "But counsel should not be allowed to state, as facts, anything of which they have made no proof." Sullivan *v.* State, 66 Ala. 48; McAdory *v.* State, 62 Ala. 154.

"It is impossible to define with accuracy the limits which should be placed on counsel in their arguments to the jury—very considerable latitude must of course be allowed, and yet it is true that the privilege may be so abused, that the court might well restrain counsel, or if satisfied that prejudice has resulted therefrom, might correct the evil by setting aside the verdict of guilty. The court, when attention is called thereto, or even of its own motion, may see that the argument is properly conducted, and certainly, where a man's life is at stake, both court and counsel for the State should take care that just limits be placed upon it, that injustice be not done to the defendant. Of course the argument should be based on the evidence received, and where there is no evidence tending to show the existence of a particular fact, a claim that it did exist, should not be allowed; nor should counsel be permitted, unchecked, to make statements to the jury as to what he could have proved if he had been allowed to do so. And while it is entirely right and proper for counsel to seek to impress the jury with the responsibility resting upon them, there should certainly be nothing in the nature of a threat or menace, if they should not find in a particular way." Thurman *v.* State, 4 O. C. C. 146.

[1] Tucker *v.* Henniker, 41 N. H. 325.

[2] Rolling Mill Co. *v.* Packard, 13 W. L. B. 591; 1 O. C. C. 76.

[3] Elliott's Gen. Pr., sec. 692; Thompson on Trials, sec. 928; Sodousky *v.* McGee, 4 J. J. Marsh. 267; People *v.* Goldenson, 76 Cal. 328. Under a statute in North Carolina a defendant has the right to have more than one of his counsel, or all that represent him, heard to the judge and jury, and the court has no authority to refuse to hear but one. State *v.* Miller, 75 N. C. 73. See People *v.* Ah Wee, 48 Cal. 236.

court cannot in such case limit the number of counsel to be heard upon a side.[1]

Sec. 632. Time may be limited.—The proper exercise of the right of argument in cases, both civil and criminal, is clearly within the legal discretion of the court. Courts doubtless may prevent their time from being unnecessarily occupied by prolix arguments, and may, therefore, place reasonable limitations upon the time to be occupied in the argument of a cause, civil or criminal, without infringement upon the constitutional right, provided time for fair discussion is given.[2] There can be no error assigned when the time is limited, unless there has been an abuse of discretion.[3] And a reviewing court will not interfere unless there is something in the record to show that appellants were deprived of reasonable time and opportunity to be heard.[4]

Sec. 633. Limitation as to subject-matter.—The court may very properly limit the argument of counsel in their address to the jury to the subject-matter embraced within the pleadings; they cannot go outside of the facts alleged, either in the introduction of evidence nor in their arguments to the jury.[5]

Sec. 634. Of the right to open and close.—The right of parties to open and close the argument is based entirely upon the rule governing the burden of proof, discussed in a former chapter. When the burden of proof is settled, the right to make the opening and closing argument is likewise determined. As we

[1] Sodousky *v.* McGee, 4 J. J. Marsh. 267.

[2] Douglass *v.* Hill, 29 Kas. 527; Houck *v.* Gue, 30 Kas. 112; Dille *v.* State, 34 O. S. 617; Trice *v.* R. R. Co., 35 Mo. 416; People *v.* Kelly, 94 N. Y. 526.

The exercise of the power should be reasonable, leaving full time for the fair discussion of the case. Weaver *v.* State, 24 O. S. 584.

When the limitation is not unreasonable, and no objection or exception is taken, to the action of the court in that regard, it will not be ground of reversal. Monmouth Mining Co. *v.* Erling, 148 Ill. 523 (1894).

On the trial of one charged with a felony, eleven witnesses were examined, and the evidence, which occupied half a day in its delivery, was circumstantial and conflicting. The accused was defended by two counsel, who were limited by the court, to thirty minutes in the argument to the jury. *Held*, That this was an abuse of power, which prevented a fair trial. Dille *v.* State, 34 O. S. 617.

To limit argument on exceptions to referee's report is within the discretion of the court. Groth *v.* Kersting, 4 Col. App. 395 (1894).

Where there is a limitation placed upon an argument, and after counsel for plaintiff has closed, defendant's counsel thereupon waives all argument upon his part of the case, the court may properly refuse, in its discretion, to permit counsel for plaintiff to make further argument. Railway *v.* Michaels, 49 Kas. 388 (1892).

[3] Sylvester *v.* Jerome, 19 Col. 128; White *v.* People, 90 Ill. 117.

[4] Smith *v.* Marx, 93 Ala. 311 (1890).

[5] Suhr *v.* Hoover, 15 O. C. C. 690.

have seen, the code prescribes the rule in civil cases that the party who would be defeated if no evidence were offered on either side, must first produce his evidence, and the adverse party must produce his evidence. The party required first to produce his evidence shall have the opening and closing argument; and if several defendants having separate defenses appear by different counsel, the court shall arrange their relative order.[1]

While the code furnishes the rule, yet it may be difficult in many cases to determine upon whom the burden rests and in whom the right of opening and closing consequently exists. When by the pleadings, it is apparent that no evidence is required from the plaintiff, the defendant ought to open; but if any proof, however slight, is required of the plaintiff, he must be allowed to go forward.[2] There is, however, considerable latitude left to the court in the matter of determining the right,[3] and the reviewing court will not interfere with the discretion of the trial court unless there is a clear abuse.[4]

The right to the opening and closing argument depending upon the burden of proof, it seems unnecessary, therefore, to enter into a detailed discussion of illustrative cases at this point, and the reader is, therefore, directed to another chapter.

In criminal cases the burden of proof is imposed by the statute upon the State. And the same statute provides that when the evidence is concluded, unless the case be submitted without argument, the counsel for the State shall commence, the defendant or his counsel follow, and the counsel for the State conclude the argument to the jury.[5] In the trial of an indictment for murder, the defense of insanity under a plea of not guilty does not change the nature of the issue so as to give the affirmative to the defendant, and entitle him to the opening and closing arguments.[6]

[1] R. S., sec. 5190. The party holding the affirmative of the issue, as a general rule, ought to open and close the evidence and arguments, and there being a number of issues, if the plaintiff holds the affirmative of any one, or if any evidence material to his case is required of him, he ought to begin. In determining the question, however, upon a complicated state of pleading, a liberal discretion is allowed to the court, and this discretion will not be reviewed except on a plain case of error. Montgomery *v.* Swindler, 32 O. S. 224. The right of the party holding the affirmative to make the opening argument is a substantial right, the denial of which is prejudicial. Clarkson *v.* Meyer, 14 N. Y. Supp. 144. But a judgment will not be reversed because the right to open and close the case was given to the party who would have prevailed if no evidence had been offered unless the record show that there were no special reasons for directing that order of trial Loudenbeck *v.* Lowry, 4 O. C. C. 65.

[2] Lexington Ins. Co. *v.* Paver, 16 Oh. 330.

[3] Montgomery *v.* Swindler, 32 O. S. 226; 2 Nash's P. & P. 972; Dille *v.* Lowell, 37 O. S. 415; Dragoo *v.* Whisner, 31 O. S. 192.

[4] Montgomery *v.* Swindler, 32 O. S. 226 and cases; Loudenbeck *v.* Lowry, 4 O. C. C. 66; Harrison *v.* Castner, 11 O. S. 347. See Neff *v.* City, 32 O. S. 215.

[5] R. S., sec. 7300.

[6] Loeffner *v.* State, 10 O. S. 598.

Sec. 635. Opening argument—Scope.—The object of an argument is the elucidation of truth, and to enable parties to make a full and complete investigation of their respective sides, and any practice which does not give them a fair opportunity for the accomplishment of this purpose should be readily condemned. The party making the opening argument should fairly develop the points upon which he expects mainly to rely, reserving no material questions for his reply, so as to indicate what the adversary is expected to meet. If this rule is not observed, and a party shall be permitted to reserve his main point or a single important matter upon which he relies, injustice to the other side is the inevitable result. The court is bound to resent such abuses. But as the propriety of interference must depend upon circumstances, it therefore comes under the discretionary power of the court.[1] The practice of reserving material questions and points in argument for the reply, is frequently indulged in. No one but counsel following this practice can tell in advance that the rule is being violated. To protect the rights of opposing counsel in such cases, therefore, the court may in the exercise of its discretionary control permit him to make a reply and afterwards allow the other counsel to close the argument.[2]

Sec. 636. Waiver of opening or reply—Effect on adversary.—Inasmuch as the right to argument is a substantial right, the interference with which results in prejudicial error, it is therefore highly proper that it shall not be imperiled by any improper practice on the part of either counsel engaged in a cause. If a party entitled to the opening argument relies on the strength of his case without discussion, waives the right to open and thereby waives the right to discuss the case generally, he should not be permitted to do so out of his order, and after the mouth of the other party is closed. His closing argument, if he should be permitted to make one, should be limited to comments on the argument of the other side. This is essential to the fairness and usefulness of juridical discussion at the bar. Where plaintiff's counsel waives the opening argument, and the defendant's counsel thereupon waives argument, the court may then properly refuse to allow plaintiff's counsel the privilege to address the jury at all.[3] And if counsel for the defendant after the plaintiff has opened his argument should decline to reply thereto, the plaintiff is thereby precluded from addressing the jury a second time.[4] If a party does not make his argument in his

[1] Barden *v.* Briscoe, 36 Mich. 255.
[2] Morales *v.* State, 1 Tex. App. 494.
[3] Creager *v.* Blank, 32 Ill. App. 615.
[4] Goodenow *v.* Tappan, 1 Oh. 60. This is said to have been the long settled practice.

proper turn, it is then discretionary with the court to permit him to make the argument at some other point.[1]

Sec. 637. The closing argument—Effect of waiver of argument by defendant.—Counsel representing the affirmative side of a case has the closing argument; it should be limited to a reply, as it would be unfair to the other side, who have no right to speak further to discuss new questions.

It has been said that the practice is settled that where counsel for plaintiff makes an argument to the jury, and the defendant's counsel declines to reply, plaintiff's counsel is thereby precluded from addressing the jury a second time.[2]

Sec. 638. Comments on failure to call witnesses.—When a person is present in court, and is competent to testify to any issue upon trial, but is not called upon to testify by the party at whose instigation he is subpœnaed, and it is made to appear in some manner, by way of inference, that his testimony would be important and material, the failure to call upon him may properly be commented upon by opposing counsel in his argument to the jury.[3]

The rule upon this point is not universal, some courts holding it to be improper practice for the trial court to permit counsel to comment upon the fact that the other party has not called and examined a material witness summoned on his behalf, holding it, however, to be discretionary with the court.[4]

If one side takes a deposition but does not put it in evidence, the adversary may comment upon that fact in his argument to the jury.[5] And so where there is a failure to introduce in evidence certain documents and books which are relevant and within the power of a party.[6]

Sec. 639. Commenting on matters not in evidence.—The rights of parties are to be determined from the evidence, and an

[1] Harrington *v.* Pouley, 26 Ill. 94.

[2] Goodenow *v.* Tappan, 1 Ohio, 61, 66.

[3] McGuire *v.* State, 3 O. C. C. 551; Gavigan *v.* Scott, 51 Mich. 373; State *v.* Jones, 77 N. C. 520; Cook *v.* Ins. Co., 86 Mich. 554.

It is customary to permit attorneys to comment upon the absence of witnesses, or their non-production when they are shown to be cognizant of the facts in issue; it is a mere matter of argument and may be discussed by either side, trusting to the good sense of the jury to properly estimate the value of such argument. Ry. Co. *v.* White, 80 Tex. 202 (1891).

The fact that plaintiff's counsel in his closing argument referred to the fact that defendant introduced no evidence on the first trial is not error. Dahlstrom *v.* Ry. Co., 108 Mo. 525 (1891). See Bendetson *v.* Moody, 100 Mich. 553.

[4] Robinson *v.* Woodford, 37 W. Va. 377.

[5] Learned *v.* Hall, 133 Mass. 417.

[6] Huntsman *v.* Nichols, 116 Mass. 521.

attorney in addressing the jury must confine his discussion to the facts as shown by the evidence which has been introduced and admitted, and is not permitted to comment upon any facts which have not been properly placed in evidence. It is said that when this rule is violated that it is *prima facie* prejudicial, and may be sufficient to cause the reversal of the case.[1]

This rule will also prevent counsel from commenting upon evidence which was offered, but upon objection is excluded because incompetent.[2]

But matters which appear from the files and records of the cause, such as a continuance granted upon motion and affidavits, or dates as shown by the records, do not come within the purview of this rule.[3]

Upon the question whether or not counsel may, in addressing the jury, read the pleadings in the case, and for what purpose, the authorities are not in entire accord. Some permit this to be done.[4] Other authorities do not permit the pleadings to be read when not offered in evidence.[5] It would be especially improper to read a pleading which has been superseded by an amended one, and which has not been placed in evidence.[6]

There can be no objection, however, when counsel is summing up the case in argument, to refer to or read the pleadings for the purpose of getting before the jury the issues in the case.[7]

[1] Ins. Co. *v.* Cheever, 36 O. S. 201; Comerford *v.* State, 23 O. S. 599; Cleveland Paper Co. *v.* Banks, 15 Neb. 20; Sullivan *v.* State, 66 Ala. 48; McAdory *v.* State, 62 Ala. 154; Randall *v.* News Assen., 97 Mich. 136.

To authorize the setting aside of the verdict the statements must have been of such a character as may reasonably be supposed to have influenced the jury. Festner *v.* R. R. Co. 17 Neb. 280.

[2] Clark *v.* State, 23 Tex. App. 260, McAdory *v.* State, *supra;* Hoxie *v.* Ins. Co., 33 Conn. 471; Gould *v.* Moore, 8 J. & S. 387.

[3] Tucker *v.* Henniker, 41 N. H. 317, 322; Festner *v.* R. R. Co., 17 Neb. 280.

Where on the trial of a criminal case, the prosecutor was permitted in his argument to the jury, and against the objection of the accused, to comment upon an affidavit filed by the defendant in support of his motion for a continuance, and to read the whole of it to the jury, it was held that this was not error to the prejudice of the prisoner, the affidavit showing nothing to his prejudice and the nature of the comments made by the prosecutor not being shown. Comerford *v.* State, 23 O. S. 599.

Counsel for plaintiff in his opening argument may read to the jury and comment on an affidavit and motion for continuance, filed by defendant at a former term. This is proper where the comments of counsel are directed to evidence expected to be furnished as alleged in the affidavit. The motion and affidavit for a continuance form part of the record, and as such is a proper subject for comment. Hamers *v.* McClelland. 74 Ia. 318; Cross *v.* Garrett 35 Ia. 486.

[4] McDonald *v.* McDonald, 16 Vt. 630; Bompart *v.* Lucas, 32 Mo. 123; Lettick *v.* Honnold, 63 Ill. 335; Jenings *v.* Asten, 5 Duer. 695.

[5] White *v.* Smith, 46 N. Y. 418; Lancaster *v.* Arendell, 4 Heisk. 434.

[6] Payne *v.* Mfg. Co., 2 Hun, 673.

[7] Abbott's Trial Brief, p. 137.

Sec. 640. Making absurd deductions from evidence—Effect.—The mere fact that counsel in argument make illogical or absurd deductions from the evidence, does not amount to misconduct which will be ground for setting aside a verdict when it is not clearly apparent that the jury was thereby misled or prejudiced.[1]

Sec. 641. May counsel in argument tell the jury what disputed question has been proven or disproven?—The following instruction to a jury given by a trial judge recently came before one of the circuit courts: "The attorneys engaged in the trial of this case may call your attention to the evidence; they may present it in such a way as to best suit their respective sides; and they can comment upon the testimony, but they have no right to tell you what disputed point has been proven or disproven."

The reviewing court in passing upon the question merely said that as nothing appears in the record as to what counsel said to the jury, and even if it were shown that counsel had said that certain facts were established beyond peradventure, all that the jury could understand by such a charge would be that the jury, and not the attorneys in the case, must determine the facts. It was held that there was no prejudicial error.[2] The author will express his opinion that it is entirely improper to give such an instruction, as the purpose of counsel is to argue and convince the jury that certain facts are proven.

Sec. 642. Comments on failure of accused to testify.—It is fundamental and elementary that an accused in a criminal cause cannot be compelled to testify, and the criminal code expressly provides that his neglect or refusal to testify shall not create any presumption against him, nor shall any reference be made to, or any comment be made upon, such neglect or refusal.[3]

"By our system of jurisprudence the State has not the right to interrogate a person accused of crime, or to compel him to testify. He may simply deny his guilt and rely on presumption of innocence, and the fact that he does not testify cannot be taken into consideration by the jury. And the courts must carefully guard this constitutional right."[4]

[1] Hayes *v.* Smith, 15 O. C. C. 301, 312, 313, 314, 315; Thompson on Trials, secs. 983, 965.

[2] Pennsylvania Fire Ins. Co. *v.* Carnahan, 10 Oh. Dec. (Cir.) 225.

[3] R. S., sec. 7286.

[4] Commonwealth *v.* Harlow, 110 Mass. 411; Commonwealth *v.* Scott, 123 Mass. 241; Horton, C. J., in State *v.* Mosely, 31 Kas. 355, said: "We understand the statute is explicit that when a defendant in a criminal case declines to testify in his own behalf absolute silence on the subject is enjoined on counsel in their argument on the trial, and that the courts will hold the prosecuting attorneys to a strict observance of their duty in this respect." State *v.* Graham, 62 Ia. 108; Long *v.* State, 56 Ind. 182; Commonwealth *v.* Scott, *supra.* The decisions of the court are practically unanimous in this holding. State *v.* Brownfield, 15 Mo. App. 593; Showalter *v.* State, 89 Tenn. 233.

But when an incidental allusion is made to the court, and not to the jury, and there is no intention to infringe on the rule, it will not be material error.[1]

Where counsel, in his argument, alludes to the fact that the accused failed to testify, but upon exception withdraws his remarks, and the court directs the jury not to consider the same, there is no error.[2]

In fact it is held to be reversible error where such comments are made and the court does not interfere and fully instruct the jury in reference thereto.[3]

But when a defendant takes the stand voluntarily he is not then exempt from unfavorable comment, but stands upon the same footing as any other witness.[4]

Sec. 643. Reading from law-books to jury.—Several views prevail among the judicial adjudications upon the question of the right to read from text-books, or judicial decisions in the argument to the jury, which will be given in this section. Some courts say that the practice of reading decisions to the jury, or in their presence, is not to be commended, but that it is not error to do so when there is no apparent prejudice resulting from such a course;[5] while other authorities hold it to be error to permit counsel to read law at all in civil cases, especially where decisions sustaining verdicts for large amounts in personal injury cases are read.[6] The prevailing view, however, and the

[1] State *v.* Mosley, 31 Kas. 357 (1884); Calkins *v.* State, 18 O. S. 366.

Where a prosecuting attorney in his argument to the jury, in commenting on confessions, claimed to have been made by the defendant, who was not examined as a witness in the case, made use of this language: "He admits that he was present when she was killed; of course he does not say he killed his mother; he did not get on the stand and say he killed her; he did not tell any one that he killed his mother; he says that the two robbers killed her, and that he stood by and saw them do it. Is this a reasonable story?" This is not such misconduct of the prosecuting attorney as would require the trial court to set aside the verdict and grant a new trial. No statement having been made to the jury, as to the right of the defendant to testify, or any comment made on his refusal to do so, and it not appearing that the defendant was in any way prejudiced thereby, it rests in the sound and legal discretion of the trial court. Schneider *v.* State, 2 O. C. C. 420.

A remark by the prosecuting attorney in his argument to the jury "that no attempt had been made by defendant to explain his possession of property," was not regarded as referring to the fact that the defendant had not testified. State *v.* Preston, 77 Mo. 294.

Where counsel is interrupted by the accused, to whom he replies, "You had an opportunity to testify in this case, and did not do so," the rule is not infringed. Calkins *v.* State, 18 O. S. 366.

[2] State *v.* Chisnell, 36 W. Va. 659. State *v.* Howard, 14 S. E. 481 (S. C. 1892.)

[3] Staples *v.* State, 89 Tenn. 233; State *v.* Balch, 31 Kan. 465; People *v.* Brown, 53 Cal. 66; State *v.* Ryan, 70 Ia. 154.

[4] McCoy *v.* State, 46 Ark. 141; Lee *v.* State, 56 Ark. 4; Hanoff *v.* State, 37 O. S. 178.

[5] Hastings *v.* R. R. Co., 53 Fed. 224; Hudson *v.* Hudson, 90 Ga. 581. Steffenson *v.* Ry. Co. 48 Minn. 285.

[6] Railroad Co. *v.* Wesch, 85 Tex. 593; Williams *v.* R. R. Co., 126 N. Y. 96; Railway Co. *v.* King, 88 Ga. 443 (1891),

one founded upon principle, is that counsel have not the absolute right to read to the jury as part of his argument extracts from law-books, which he claims state the law governing the case. But that it is a matter resting entirely in the sound discretion of the court as to whether counsel shall be permitted to take this course, and that it is not necessarily reversible error for the court to permit counsel to read the law to the jury.[1]

The course usually pursued, and the one which may be permitted in the discretionary power of the court, is for counsel in the opening argument to first address the court upon the questions of law involved, and in support of his argument, read extracts from text-books or decisions in the hearing of the jury.[2]

It is within the court's discretion to allow the presence of the jury while counsel, in the course of argument, reads from the books.[3] The supreme court of our State by an equally divided decision has held it to be error to read, in the hearing of the jury, comments from an opinion in a case upon the facts as shown at a previous trial of the the case.[6]

Sec. 644. Reading from books of science.—Books of science, such as medical authorities, are upon an entirely different footing from legal works and reports of judicial decisions, and may be used in arguments of counsel only for one purpose. Counsel may, in his argument to the jury, read extracts from books of science merely for the purpose of a more complete illustration of points in argument, but can never read them when they contain any statement of fact or expressions of opinion. The reason of this rule is obvious. For example, medical authorities, unlike legal works, are regarded as containing merely

[1] McGuire *v.* State, 3 O. C. C. 551 (see opinion in this case); State *v.* Brooks, 5 S. W. 257 (Mo.); Railway Co. *v.* Lamothe, 76 Tex. 222; Railway Co. *v.* Wesch, 85 Tex. 593; holding it not to be reversible error unless it is made to appear that injury has resulted. Gregory *v.* R. R. Co., 37 W. Va. 606 (subject to review in case of abuse of discretion); Tuller *v.* Talbott, 23 Ill. 357; People *v.* Anderson, 44 Cal. 65; Sullivan *v.* Royer, 72 Cal. 248; 1 Am. State Rep. 51; Curtis *v.* State, 36 Ark. 284.

It is also within the discretion of the court whether counsel may, after making opening argument to the jury, read authorities to the court and make arguments on the same. Davis *v.* Gerber, 69 Mich. 246. See State *v.* Baldwin, 36 Kas. 1.

[2] Rutledge *v.* Hudson, 80 Ga. 266.

[3] Sanborne *v.* Cunningham, 33 Pac. 894 (Cal. 1893).

On the trial of civil cases, decisions of this court, especially its comments upon facts of cases, should not be read by counsel to the jury. Such practice cannot aid the jury in sustaining the law applicable, for this they must take from the court; nor in arriving at the truth of the case on the facts, for this they must get from the evidence. Hudson *v.* Hudson, 90 Ga. 581.

Reading authorities to the court, in the hearing of the jury, is a matter of practice, largely confided to the discretion of the trial court; and, unless an abuse of such discretion is shown, it will not be reviewed. Western Union Telegraph Co. *v.* Wingate, 6 Tex. Civ. App. 394.

[4] Railway Co. *v.* Stewart, 54 O. S. 667.

expressions of opinion by the author, and can never be admitted as evidence for that reason, and also because the author cannot be present to be cross-examined by opposing counsel.[1] The exception, therefore, to the rule precluding counsel from reading from books of science is as stated, when it is done by way of argument or illustration, in which case counsel may adopt and make it part of his own address, but cannot use it as evidence in the case.[2] They cannot, however, be read by way of illustration when they contain statements of fact or expressions of opinion concerning the case on trial, or like cases, or when it would naturally divert the attention of the jury from the questions which they ought to consider. If that be done it is an abuse of the privilege of counsel for which a verdict in favor of the party whom he represents should be set aside, unless the prejudicial effects of such extracts have been averted by proper instructions by the court.[3]

Sec. 645. Stating law to the jury.—Statements of counsel to the jury of what they consider the law to be in a case upon trial, is somewhat different from reading from text-books or judicial decisions in their presence, discussed in the preceding section. The law must be given to the jury by the court, and they must be governed in their verdict by the law so laid down, whether right or wrong, and cannot regard statements made by counsel. It has been held that while counsel have no right to read law to the jury or to usurp the province of the court in this respect, they have the undoubted right to state so much of the law, as they claim it to be, as may enable them to lay before the jury an intelligent idea of the force, effect and bearing of the testimony upon their case, either before or after the testimony is in in the case.[4]

Cases may occasionally arise where it may seem necessary in order to fully illustrate the questions of fact claimed by counsel, to state so much of the law as will accomplish this purpose, and the court may permit this to be done upon the same principle that it will permit the reading of books of science for purposes of illustration.

[1] Stilling *v* Thorp, 34 Wis. 528; People *v*. Wheeler, 60 Cal. 581; Boyle *v*. State, 57 Wis. 477; Yoe *v*. People, 49 Ill. 410; Northington *v*. State, 14 Lea (Tenn.) 424.

The proper method of treating a disease cannot be shown by a medical book Gale *v*. Rector, 5 Bradw. 481. See also People *v*. Glover, 38 N. W. 874.

[2] Legg *v*. Drake, 1 O. S. 286.

[3] Gen'l. Con. of New Jerusalem Church *v*. Crocker, 7 O. C. C. 327; Cleveland Paper Co. *v*. Banks, 15 Neb. 20; Tucker *v*. Henniker, 41 N. H. 318; Hall *v*. Wolf, 61 Ia. 559; Huckel *v*. McCoy, 38 Kan. 53; Baldwin *v*. Bricker, 86 Ind. 221; Rudolph *v* Landwerlein, 92 Ind. 34; Ins. Co. *v*. Cheever, 36 O. S. 201.

[4] Fosdick *v*. Van Arsdale, 74 Mich. 305; Edwards *v*. Common Council, 96 Mich. 625 (1893).

Sec. 646. Appeals to prejudices of jury.—The practice of appealing to the prejudices of jurors in argument is prejudicial to the adversary, and should not be permitted. It is the duty of the court to reprimand counsel in such case, as well as to instruct the jury that such matters should be disregarded by them. If the court fails to observe this rule, but gives silent acquiescence to such a course, it will furnish grounds for reversal upon error.[1]

For example, counsel should not be permitted to say in an argument against a railroad company that it was a monster, wealthy and powerful, more powerful than any individual citizen in the State, and is not on an equality with any private citizens, when such comments are made for the purpose of inflaming the passion and prejudice of jurors, and to lead them to disregard their duty, and overlook actual facts. It is said, however, that when made for the purpose of stimulating the jury to a careful and conscientious discharge of their duty in the particular case, there is no objection.[2]

And so may it cause prejudicial error where counsel in an action against a railroad company for personal injury, remarks that railroad companies are always pleading contributory negligence.[3]

It is also improper to attack or comment upon, for the purpose of appealing to passions and prejudices of jurors, any particular nationality, such as calling the Jews "Christ-killers."[4]

Sec. 647. Absence of judge during argument.—There can be no iron-clad rule made in regard to the enforced presence of the judge during argument of counsel or at any other stage of the trial. Whether the absence of the judge will cause prejudicial error must depend upon what occurs during his absence. It may readily be seen that if counsel, during such absence, oversteps the bounds in argument, to which his adversary interposes an objection, the wrong cannot be remedied as readily as it could were the judge present at the time. It is really unsafe and unfair to the parties that the judge should be absent during any stage of the trial. The consequences resulting from such absence may be such as to necessitate the granting of a new trial.[5]

[1] Houston Water Works Co. *v.* Harris, 3 Tex. Civ. App. 475; Wichita Valley Mill, &c., Co. *v.* Hobbs, 5 Texas Civ. App. 34.

[2] Railway Co. *v.* Silgeman, 23 S. W. 298; Henry *v.* Huff, 143 Pa. St. 548. The advocate who makes such remarks forgets his official oath, and the judge who permits them neglects a clear official duty. *Id.*

[3] Railway Co. *v.* McLendon, 26 S. W. 307 (Tex.).

[4] Cluett *v.* Rosenthal, 100 Mich. 193; Freeman *v.* Dempsey, 41 Ill. App. 554.

[5] Rose *v.* Otis, 31 Pac. 493 (Colo. 1892). See O'Shields *v.* State, 81 Ga. 301.

Sec. 648. Correction of abuses in argument. — Very many abuses in argument may be sufficiently corrected by the instructions of the court to the jury, and for this reason a reviewing court will not interfere when an abuse in argument has been sufficiently counteracted in this manner. It will only interfere when the irregularity appears to be such as to have prevented a new trial;[1] as where counsel deliberately argues on matters outside of the record, and persists in so doing after repeated objections, and in the face of admonitions of the trial court.[2] Improper remarks will not cause prejudicial error unless it can be shown that the jury were influenced thereby.[3]

It is the settled rule, that in order to save any question in relation to the miscondnct of counsel during the progress of trial, that the court must be called upon to correct the injury done; if the court refuses to do so, the party injured may except, and thus save the question involved for the consideration of the reviewing court. If the court does all in its power to correct the injury, no question can be presented to the reviewing court unless the injured party moves to discharge the jury, or takes such steps as he may think will secure to him a fair and impartial trial.[4]

The question may be saved and taken up by means of a bill of exceptions. An objection, however, must be made, a ruling had thereon, and exceptions taken, or the same will not be reviewed on error.[5] Objections must be made at the time, although it is in the discretion of the court to entertain exceptions taken to the remarks of counsel where no objection was made to the remarks until after the jury had returned to the bar of the court and announced that they had agreed on a verdict.[6] The presumption in the absence of anything to the contrary is that the court performed its duty.[7]

[1] Rudolph *v.* Landwerlin, 92 Ind. 34; Wilburn *v.* Ry. Co., 48 Mo. App. 232–3.

Nor can error be assigned where the court reprimands counsel and directs him to keep within the record, if no injury results; or where the court instructs the jury to disregard them. M. M. Manfg. Co. *v.* Erling, 148 Ill. 521; Talmage *v.* Smith, 101 Mich. 370; Chesebrough *v.* Conover, 140 N. Y. 382; Graves *v.* Smith, 7 Wash. 14; Chicago City Ry. Co. *v.* Van Fleck, 143 Ill. 480; Ry. Co. *v.* Greenwood, 2 Tex. Civ. App. 76; Johnson *v.* Brown, 130 Ind. 534.

[2] Wilburn *v.* R. R. Co., *supra.*

[3] Ry. Co. *v.* Croskell, 6 Tex. Civ. App. 160; Western Union Tel. Co. *v.* Jobe, 6 Tex. Civ. App. 403.

[4] Warder *v.* Jacobs, 58 O. S. 77; Staser *v.* Hogan, 120 Ind. 207; Grubb *v.* State, 117 Ind. 277; Kern *v.* Bridwell, 119 Ind. 226; Coleman *v.* State, 111 Ind. 563; Mainard *v.* Reider, 2 Ind. App. 115.

[5] Warder *v.* Jacobs, 58 O. S. 77; State *v.* Nusbaum, 52 Kas. 52; Augusta Ry. Co. *v.* Glover, 92 Ga. 132; Snyder *v.* Travers, 45 Ill. App. 253; Brooker *v.* Felkins, 25 N. Y. Supp. 514.

[6] Ackerman *v.* Third Ave. R. Co., 27 N. Y. Supp. 1020.

[7] Warder *v.* Jacobs, 58 O. S. 77.

CHAPTER XXXI.

INSTRUCTIONS TO JURY.

SEC.
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SEC. 649. Object of chapter is to point out the essential points of the general rules of law governing the giving of instructions to the jury which are encountered in the daily practice of the practitioner. These rules become quite familiar to the elder practitioner, but a lack of familiarity therewith has proven dangerous pitfalls to the young practitioner. A collection of those general rules may also be of value to all, for ready reference.

SEC. 650. The charge given, when.—The charge is given by the court after the evidence and arguments of counsel are concluded.[1] Requests may be asked before the argument proceeds; an opportunity is then afforded counsel to argue the propositions made in the requests; and the reason why the charge of the court must follow the argument is to give counsel

[1] R. S., sec. 5190.

the privilege of presenting the law of the case to the court. It is usual for counsel to first argue the law to the court before proceeding with the argument upon the facts to the jury. The statute requires the court to give or refuse the instructions before the argument is commenced.[1] The court gives or refuses the requests at the time of making the general charge, unless the parties ask to have the requests given before argument, in which event the court is bound to give the same.[2]

Sec. 651. Province of court and jury.—It was said by Birchard, J., in 1842: "We are aware that in some parts of the State an opinion prevails that in all criminal trials the jury have a right, independent of the directions of the court, to determine as well the law of a case as the facts."[3] The court further stated that the right of the jury "to judge of the law is a right to be exercised only under the direction of the court; and, if they go outside from that direction, and determine the law incorrectly, they depart from their duty and commit a public wrong, and this in criminal as well as civil cases."[4] The jury have nothing whatever to do with the law, and the court cannot submit any question of law to them for their decision; they are bound to take the law as it is given to them by the court. It is the duty of the court to aid the jury in their search after truth,[5] but it must not in the slightest degree invade the province of the jury by making undue comments upon the facts[6] nor by expressing opinions. The court must not assume a material fact concerning which there is a dispute,[7] nor use language from which the jury might reasonably infer that the court assumed the existence of facts.[8] It is the sole province of the jury, unhampered by any expressions by the court, to decide upon the weight and credibility of conflicting testimony and to determine the issues of fact accordingly.[9] The English practice, as will be explained in a later section,[10] differs from the American practice with reference to commenting upon the evidence. The English practice allows the court to comment upon the bearing and weight of the evidence and to state the legal rules upon the subject. The Federal courts follow this practice.[11] The practice of allowing the judge to comment upon the evidence destroys to a very great extent the purpose of the jury, as it exerts a great influence upon their judgment. There is ample

[1] R. S., sec. 5190.
[2] Sec. 665, *post*.
[3] Montgomery *v.* State, 11 O. 427.
[4] *Id.*
[5] Bossert *v.* State, W. 113.
[6] See sec. 660, *post*.
[7] Cline *v.* State, 43 O. S. 332.
[8] Weybright *v.* Fleming, 40 O. S. 52.
[8] Hollenbeck *v.* McMahon, 28 O.S. 1.
[9] Sec. 659, *post*.
[10] Lovejoy *v.* U. S., 128 U. S. 171; U. S. *v.* Phila. & R. R. Co., 123 U. S. 113; Vicksburg & R. R. Co. *v.* Putnam, 118 U. S. 545.

protection, however, upon unjust verdicts in the reservation of the right of the court to set aside the verdict when manifestly against the weight of the evidence or the law.

Sec. 652. The practice of directing non-suit or verdict explained.—The duty of the court to direct a verdict in certain cases is an important as well as a delicate one. The term "directing a verdict" is commonly used. Our statutes[1] only incidentally recognize "a motion to direct a non-suit, or to arrest the testimony from the jury." What does this mean; what is a non-suit, and what does the court do when it arrests the testimony from the jury; does it direct a verdict?

Another section of the code provides for the dismissal of an action without prejudice, and requires that: "In all other cases the decision must be upon the merits, upon trial of the action."[2] These two statutory provisions should be considered together in determining the power of a court to direct a verdict, or to direct a non-suit. It has been contended that the effect of the section authorizing the direction of a non-suit was to restore the common-law remedy of non-suit, with all its incidents and consequences, as it existed in the State before the code. These were, in effect, not to enforce the order of non-suit by a direction of a verdict, as the non-suit left the parties free to commence a new suit.[3] The court held against this contention; that "under the act of April 12, 1858, which is section 5301 of the present code, the court is authorized in a proper case to arrest the testimony from the jury, and render judgment for the defendant. The judgment in such case, however, has not the effect of a non-suit at common law, but is, under the provision of the code above referred to, a decision of the action on the merits."[4] Thus we have a satisfactory explanation of the practice in our own State upon this matter, to the effect that when the court, either sustaining a motion for a non-suit, or arrests the testimony from the jury, a verdict should be directed for the defendant, judgment rendered for the costs against the plaintiff, and the cause dismissed. The court by construction has supplied what seems to be a missing link in the statute; the latter does not in terms say what the court may do when it directs a non-suit

[1] Sec. 5301.

[2] Code, sec. 5314.

[3] Wilcox *v.* Singletary, W. 420; Hall *v.* Blake, W. 489. In 1855 before the code, Justice Ranney said, a non-suit "takes the evidence from the jury, prevents a verdict, and disposes of the case."

[4] Stockstill *v.* Railroad Co., 24 O. S. 83. "'It is the policy of the law, and to which it has been the object of our legislature to conform the practice of our courts, that there should be an end of litigation.'" 11 O. S. 365. In the case of Byrd *v.* Blessing, 11 O. S. 362, the trial court ordered a non-suit, discharged the jury, and entered a judgment against the plaintiff.

Having now explained the practice, or mode of directing a verdict, we will next discuss when a verdict may be directed.

Sec. 653. When court may direct a non-suit—Or verdict.—The power of the courts to order a non-suit has in some form been constantly exercised since the first organization of the State. The existence of the power was never questioned, but the propriety of its exercise in particular cases has been obstinately contested. Its exercise does not constitute the slightest encroachment upon the constitutional right of trial by jury. When all the evidence offered by the plaintiff has been given, and a motion for a non-suit, or to arrest the testimony from the jury, is interposed, a question of law is presented for the court. When and under what circumstances a court will direct a verdict is the important question, and upon which there is a diversity of judicial opinion in various jurisdictions. But in Ohio we are not concerned in the least in this difference of opinion, but need only look to our own decisions, and we cannot place any reliance upon an encyclopediac treatment of the subject in an effort to cover the whole of this great nation. "If there is anything eminently and exclusively our own, it is our system of procedure."[1]

Very early our courts adopted what is known as the scintilla rule, that where there is *any* evidence, however slight, *tending* to prove the facts essential to make out a case for the plaintiff, a non-suit cannot properly be ordered; it is in no case a question as to weight, but as to the relevancy of the testimony; therein lies the question of law. The court is not authorized to weigh the evidence. If the testimony tends to prove a *prima facie* case, a non-suit cannot be ordered.[2] It is only where there is no evidence tending to prove the facts alleged that the court should direct the verdict.[3] Or where the evidence is such as to clearly show that the plaintiff has no cause of action.[4] And a verdict may be directed where the plaintiff, on the pleadings, is entitled to recover, and there has been no testimony offered tending to disprove his case.[5]

Much has been said about the practice in other States, as also by way of criticism of the Ohio rule, but it is useless to discuss those matters here.

[1] Justice Ranney, 4 O. S. 645.

[2] Ellis *v.* Insurance Co., 4 O. S. 628; Stockstill *v.* R. R. Co., 24 O. S. 83; Byrd *v.* Blessing, 11 O. S. 362; Baltimore & Ohio R. R. Co. *v.* R. R. Co., 16 O. C. C. 87; Stewart *v.* Bridge Co., 15 O. C. C. 601; Hughes *v.* Lehan, 1 O. C. C. 9; Dick *v.* R. R. Co. 38 O. S. 389; Wagner *v.* Zeigler, 44 O. S. 59.

[3] Charles *v.* Patch, 87 Mo. 450; Miller *v.* Armleder, 4 O. N. P. 234.

[4] Miller *v.* Armleder, 4 O. N. P. 234.

[5] Whelan *v.* Kinsley, 26 O. S. 131.

Sec. 654. Instructions must be founded on issues and testimony.—In the first place the instructions must be confined to the issues made by the pleadings. The first thing which the court must explain to the jury is what the issues are; the jury must not be left to examine the pleadings themselves for the purpose of ascertaining the issues; but it is the duty of the court to sift the pleading and state the issues to the jury.[1] And an instruction which is not confined to and based upon the issues is erroneous.[2] And if there has been no evidence offered tending to establish any of the issues the court may properly so instruct the jury. The charge of the court must always be founded upon and be applicable to the evidence, which is admissible under the issues.[3] In giving a general rule, as applicable to the evidence, if there is evidence tending fairly to bring the case within an exception to that rule, it is proper for the court, in connection with the rule itself, or in some other part of the charge, clearly to refer to the exception and the testimony tending to sustain it.[4] Hence, irrelevant instructions upon purely conjectured or abstract propositions of law cannot be given,[5] and requests for instructions foreign to the case must be refused.[6]

Where requests to charge are made which are pertinent to the evidence, the court should not annex thereto a material qualification, based upon facts purely conjectural, and upon which no evidence has been offered.[7] And so must the court refuse to give a specific instruction which, though correct under a different state of facts, requires essential qualifications to prevent it from misleading the jury and excluding from their consideration the particular and material facts and circumstances of the case.[8] A very important exception is made by some courts to the rule that the instruction must be founded on the case made by the pleadings. The exception is based upon the right of the court under the provision of the code to disregard errors or irregularities; and that where evidence has been introduced which may not be exactly authorized under the pleadings, but which never-

[1] Shaw *v.* McK. Co., 56 Mo. App. 521; Bryan *v.* R. R. Co., 63 Ia. 464; Porter *v.* Knight, 63 Ia. 365.

[2] Queen Ins. Co. *v.* Leonard, 9 O. C. C. 46; Coos Bay, &c., Co. *v.* Siglin, 26 Ore. 387; Daugherty *v.* Ry. Co., 87 Ia. 276; Libby *v.* Scherman, 146 Ill. 540; Sweet *v.* Eclec. Co., 57 N. J. L. 224.

[3] White *v.* Thomas, 12 O. S. 312; Lytle *v.* Boyer, 33 O. S. 506; Little Miami R. R. Co. *v.* Wetmore, 19 O. S. 110; Hammond *v.* Bookwalter, 12 Ind. App. 177; Elliott's Gen. Pr., sec. 899. Instructions not based on evidence are erroneous. Bowles *v.* Lewis, 58 Mo. App. 649; Barzynski *v.* Stolba, 51 Ill. App. 388; Dooner *v.* Canal Co., 164 Pa. St. 17. An instruction, though correct, is erroneous where there is not sufficient evidence to support the verdict on the theory of the charge. Tischler *v.* Kurtz, 35 Fla. 323.

[4] White *v.* Thomas, 12 O. S. 312.

[5] See sec. 672, *post*. City of Abilene *v.* Hendricks, 36 Kan. 196.

[6] Oliver *v.* Sterling, 20 O. S. 391.

[7] Bain *v.* Wilson, 10 O. S. 14; Walker *v.* Stetson, 14 O. S. 89.

[8] Callahan *v.* State, 21 O. S. 306.

theless is proper and make out a case, the court may permit the pleadings to be amended to conform to the proof, and the jury may accordingly be instructed with reference to the evidence so introduced.[1] When the charge is in all things applicable to the issues, it will be presumed in the absence of steps taken to save the case for review upon the evidence, that there was submitted to the jury evidence to support the issues in the pleadings, and that to the evidence so given the charge is responsive.[2]

Sec. 655. Failure to charge on propositions involved.—It may be safely stated that it is the duty of the court to instruct the jury on all questions of law necessarily involved in a case. While this may be true as a general rule, still there can be no complaint where the court has failed or inadvertently omitted to instruct upon some material point, in the absence of a special request; there is no error if the charge as given be correct or unexceptionable, unless a request be made to instruct upon the omitted point, and the same is refused. The court cannot be expected to cover every point unaided by counsel; the latter must call the attention of the court to such omission.[3]

Sec. 656. Instruction should be clear and explicit.—It is highly essential that the charge be clear and explicit, full and accurate, and so distinctly applicable to the case made by the proofs, as not to be open to two constructions, so that the jury are liable

[1] Thompson on Trials, secs. 2310, 2311, 2312.

[2] The T. & O. C. Ry. Co. *v.* Marsh, 17 O. C. C. 379.

[3] Meyer *v.* State, 1 O. N. P. 241. See also generally, secs. 665, 666, 667, *post.* Smith *v.* R. R. Co., 23 O. S. 10; Clark *v.* Clark, 16 O. C. C. 103. Such omission standing alone, does not constitute error, for which the judgment will be reversed. Hills *v.* Ludwig, 46 O. S. 377; Taft *v.* Wildman, 15 O. 123; Jones *v.* Ohio, 20 O. 34; Rolling Mill Co. *v.* Corrigan, 46 O. S. 283, 294; Meyer *v.* State, 1 O. N. P. 241. Where the charge of the court is correct so far as it goes, but omits to state a proposition of law involved in the case, but to which its attention was not called, otherwise than by a general exception to the charge, the omission is not error for which the judgment will be reversed, provided the jury are not misled by the charge. Schryver *v.* Hawkes, 22 O. S. 309; Farmer *v.* Farmer, 129 Mo. 530; Dimmick *v.* Babcock, 92 Ia. 692. The omission of a court, in its charge to the jury, to define or explain doubtful words or phrases contained in a statute, upon which the action is founded, does not constitute a ground for reversal, unless such definition or explanation was requested by the party claiming to have been prejudiced thereby. Schneider *v.* Hosier, 21 O. S. 98. Where the error complained of in the supreme court is that the trial court omitted to charge the jury a proposition of law involved in the case, and the court's attention was not directed to it except by a series of propositions, all of which the court refused to give, and the alleged error was not included in the motion for a new trial, or assigned in the circuit for error, it will not be considered here, unless for some special or peculiar reasons, affirmatively appearing upon the record. Hills *v.* Ludwig, 46 O. S. 373; *cf.* Billings *v.* McCoy, 5 Neb. 187; Chapman *v.* McCormick, 86 N. Y. 479; Carey *v.* Chicago &c., Co., 61 Wis. 71. Bishop's New Crim. Pr. says: "There are omissions of the imprompted judge so damaging as to require subsequent redress, but as to them the practice is varying, and seems to be nowhere reduced to a rule."

to misconstrue or misunderstand it. This is as necessary as that it should be a correct statement of the law. An instruction, therefore, lacking in these respects, and which, for want of such certainty and explicitness in its adaptation to the case, is calculated to confuse and mislead the jury, furnishes ground for reversal.[1] General rules of law, however, are presumed to have been understood with reference to the facts of the case.[2] It is not safe nor proper to state mere general rules where there has been evidence introduced which would bring the case within an exception to that rule;[3] nor is it proper for the court to read mere extracts from opinions in other cases which have no special reference to the issues in the case.[4]

In other words, the charge must not be misleading as to the law of the case.[5] In the consideration of these matters by a higher court, it must be remembered that the record should disclose the entire charge; and if only part is given, which when considered alone is susceptible of two meanings, one right, the other erroneous, it will be presumed that the jury understood the right one.[6] And to preserve any questions as to ambiguities, or as to its being misleading, counsel must call the court's attention to it,[7] and must request specific instructions applicable to the case.[8] The error committed in failing to instruct upon a particular question, or in not completely instructing, or by partial non-direction, cannot be taken advantage of by mere exception on that ground, but there must be an appropriate instruction asked and refused upon which to predicate error.[9] If that rule is the one followed under the Ohio statute, it is rather a hard one. The requests are made before argument, and it would impose a duty upon counsel of preparing a series of requests before the general charge is given. For after the charge has been given under the statute it is too late to request instructions. But it is frequent practice for courts at the end of a charge to ask if there is anything more, and then an oppor-

[1] Insurance Co. *v.* Reed, 33 O. S. 283 See Adams *v.* State, 29 O. S. 413, 414. Judge Thompson, in his work on Trials (sec. 2325), says: "But the court is not obliged to illustrate every point of law, given in the charge in every conceivable way; it will be enough, if the illustrations given do not inculcate any false principle." "It must be accurate, (Bank *v.* Eitemiller, 14 Bradw. 22) clear, (Cothran *v.* State, 39 Miss. 541) pointed and definite." McKinney *v.* Snyder, 78 Pa. St. 497.

[2] Holterhoff *v.* Mut. Ben. Life Co., 3 Am. L. Rec. 272.

[3] White *v.* Thomas, 12 O. S. 314.

[4] Railroad Co. *v.* Pickelly, 24 O. S. 654.

[5] Insurance Co. *v.* Ins. Co., 5 O. S. 450.

[6] Davis *v.* State, 25 O. S. 369.

[7] Railway *v.* Murphy, 50 O. S. 135, 145.

[8] Railroad *v.* Hambleton, 40 O. S. 496, 504; Jones *v.* State, 20 O. 34; Taft *v.* Wildman, 15 O. 123.

[9] Jones *v.* State, 20 O. 34. See *ante*, sec. 665; Thompson on Trials, sec. 2325, 2341, and numerous cases.

tunity is offered to point out points upon which no instruction has been given.

Sec. 657. Technical language in.—It is no objection to the charge of the court that technical phrases are employed. It is often necessary to employ phrases more familiar to unprofessional men ; and if the jury be not misled, there is no error in so doing.[1]

Sec. 658. Construction of written instruments.—Whenever the construction of a written instrument is involved in a case it is the duty of the court to construe it for the jury. Where a contract in writing is given in evidence to the jury, but the same is not read in the hearing of the court, nor the attention of the court otherwise specially called to its provisions, the failure of the court to construe the contract, and to charge the jury as to its legal effect is not error. If, in such case, parties desire from the court a legal construction of written instruments in evidence, it is their duty to request it.[2]

Sec. 659. Summing up, or commenting on evidence—Earlier practice.—The English practice with respect to summing up and commenting upon the evidence is radically different from that adopted in most of the American States. The judge may not only sum up the evidence to the jury, but may also advise them regarding it, giving his opinion, so long as the evidence is ultimately committed to the jury to exercise their discretion. To illustrate the trend of the English practice some authorities are given in the note.[3]

[1] Gano *v.* Samuel, 14 O. 592.

[2] Railroad Co. *v.* Ilif, 13 O. S. 235.

[3] C. J. Tindall in Davidson *v.* Stanley, 3 Scott's N. R. 49, said: "I am unable to discover that any proposition of law was incorrectly laid down by the learned Baron in his direction to the jury. His remarks undoubtedly tended to show that he entertained a strong opinion against the plaintiff's right to recover. I think he was perfectly justified in telling the jury the precise effect of the evidence upon his own mind."

Lord Tenterden, C. J., in Solarte *v.* Melville, 7 Barn. & C., 430, said: "We are all, however, agreed that, notwithstanding I did intimate to the jury my own opinion upon the subject. yet as I left it to them to exercise their own discretion, and to draw their own conclusion from the evidence we ought not to disturb this verdict."

3 Chitty's Pr. 912–3. "It is the practice for the judge at *nisi prius* not only to state to the jury all the evidence that has been given, but to comment on its bearing and weight, and to state the legal rules upon the subject and their application to the particular case, and even to advise them as regards the verdict they should give, so that it may accord with his view of the law and justice; so that in effect, in general, the jury only give their opinion on the *existence of* facts, and even then, in general they follow the advice of the judge, and therefore, in substance, the verdict is found or anticipated by the judge's direction. . . . The accuracy of the summing up of the judge is, therefore, of the very utmost importance, because if the jury, after hearing the evidence and the powerful arguments which probably have been urged in favor of quite opposite views of the

Sec. 660. Summing up or commenting on the evidence—American rule.—In this country the prevailing idea is that the jury are to decide the facts uninfluenced by the opinion or advice of the court. While we have adopted the common-law view of the jury in some respects we do not look with much favor upon the English practice in regard to commenting upon the evidence. The right of trial by jury is one of the corner-stones of American liberty and security; and the predominant purpose is that they shall be the exclusive judges of the facts. This being so, it is wholly inconsistent that the judge should be permitted to lend his influence in favor of one side or the other. The State courts generally adopt this view and repudiate the English practice. The judge must not encroach in the slightest degree upon the province of the jury. Jurors are constantly inclined to look to the opinion of the judge for instructions as to what is, and what is not the evidence,[1] and it is, therefore, the duty to beparticularly cautious. In Ohio the court is not required to sum up the evidence to the jury, although it may not be improper to do so providing it is fairly done, and all the material evidence on both sides is fairly presented; isolated parts should not be singled out and the law stated with reference thereto; nor should particular parts be emphasized, nor important parts be slighted.[2] The treatment of the testimony in the charge is a very delicate and cautious task, and should be done so as not to unfairly influence the jury. It is improper, for example, to say that oral evidence will or will not prove a recission of a contract.[3]

"Instructions advising the jury of the object for which particular items of evidence are admitted, and cautioning them against being misled by their improper use, are certainly proper,

question, were entirely left to decide for themselves, without impartial direction, what just and legal weight ought to be attached to this or to that view of the case, it would be difficult, if not impracticable, for them to come to a just conclusion; and hence, in the administration of civil justice, it is incumbent on the judge to correctly state the law upon the case, as well as the evidence, and the bearing of the latter; and he may and ought to direct the jury that they should find a named verdict if they believe the testimony adduced for one of the parties; either generally, or the evidence on a particular point." See 1 Starkie on Ev. 472.

Judge Swan, in his original work on Common Law Practice, before the adoption of the code, said: "The court in their charge to the jury usually give a summary statement of the testimony and the law of the case upon a hypothetical statement of the result of the evidence. The jury are of course the sole judges of facts. . . . It is within the province and it is the duty of the court, to disentangle the case from any mistakes made by counsel in the statement of the testimony, and for this purpose restate and comment upon the testimony. But the court depart from their province when they instruct a jury to find any facts in issue as proved, or to assume to decide facts for the jury." Pp. 909, 910.

[1] Walker *v.* Stetson, 14 O. S. 90.

[2] Morgan *v.* State, 48 O. S. 371; Thompson on Charging the Jury, p. 111.

[3] Hopkins *v.* Sickles, W. 376.

and are often called for by the circumstances of the case ; but the instructions ought to be so given as neither to withdraw the evidence from their consideration, nor to restrain them from giving to it, in connection with the other evidence in the case, such weight in respect to the matter which it tends to prove, as, in the light of reason and good sense, they may, as thus advised, believe it to deserve."[1]

In a criminal case it is improper to charge that proof of the prisoner's good character is entitled to less weight where the question is one of great and atrocious criminality, than upon accusations of a lower grade;[2] nor that they should only consider the good character of the accused in doubtful cases.[3] Nor should the court assume the existence of facts merely because no witness has denied them,[4] nor use any language leading the jury to believe that the court does assume the existence of facts.[5] Nor should a jury be told to determine a given problem from the evidence before them, as they can hardly do otherwise after such an instruction than to infer that, in the judgment of the court, there *is* evidence upon which their verdict, when given, may rest.[6] The court may properly say that one witness is contradicted by another,[7] but must not charge the jury upon the weight or sufficiency of the evidence,[8] further than to instruct them upon the character and rules of evidence.[9]

The recital of the respective claims of the parties as to what they may claim to be proven, when fairly made for the purpose only of making a proper application of the law arising in the case, is not improper so long as the jury are left as the unbiased triers of the issues of fact.[10] The recital of the evidence must be correct statements thereof, otherwise it will be error.[11] And so may the court give a synopsis of the evidence of both sides without admission or expression of opinion thereon.[12] Nor is it usurping the functions of the jury in repeating to them the statement of a witness, informing them, where such is the fact, that counsel on both sides admit the truth of the statement. The court has the right to state the evidence, including the admissions of counsel, provided that the statement is made truly.

[1] Harrington *v.* State, 19 O. S. 264.
[2] *Id.*
[3] Stewart *v.* State, 22 O. S. 477.
[4] Morgan *v.* State, 48 O. S. 37.
[5] Weybright *v.* Fleming, 40 O. S. 52; Cline *v.* State, 43 O. S. 332; B. & I. Ry. Co. *v.* Snyder, 24 O. S. 670.
[6] Walker *v.* Stetson, 14 O. S. 90; Insurance Co. *v.* Cheever, 36 O. S. 210.
[7] Jasper *v.* Mallon, 11 W. L. B. 166.
[8] Hummel *v.* State, 17 O. S. 628; Jones *v.* State, 65 Ga. 506.
[9] See sec. 661, *post.*
[10] Mimms *v.* State, 16 O. S. 225, 233; 1 Bish. N. Cr. Pr , sec. 979 and cases.
[11] Gen. Con., &c., *v.* Crocker, 7 O. C. C. 327.
[12] Rose *v.* Otis, 5 Col. App. 472.

Especially is this the right and duty of the judge when there is no dispute, and when counsel agree as to what the evidence is.[1]

In giving instructions as to the consideration of the testimony of an accomplice, the court may tell the jury that his evidence should be cautiously received and closely scrutinized, and by way of introducing of such caution where such is the fact, the court may properly say that the witness "admits her complicity in the crime."[2] The United States courts have adopted the English practice of commenting upon the evidence, as shown by the subjoined note.[3]

Sec. 661. Instructions as to evidence.—There is no more delicate duty incumbent upon the judge than that of instructing the jury regarding the various rules of evidence. There are a number of rules which must be explained to the jury to enable them to intelligently decide the disputed facts from the proofs. What is meant by preponderance of evidence, reasonable doubt, rules governing the credibility of witnesses, and of the weighing of testimony, the admitted facts, the testimony of interested witnesses, of accomplices, &c., must be fully explained. In performing this duty care must be exercised lest there be an encroachment upon the province of the jury. The judge must not, at any

[1] Bond *v.* State, 23 O. S. 349. Admitted facts may be stated. L. E., &c., R. R. Co. *v.* Utz, 133 Ind. 265; Anderson *v.* State, 104 Ind. 467.

[2] Whiting *v.* State, 48 O. S. 220, 236.

[3] "In summing up a cause to a jury, many facts are often so clearly proved, or remain uncontested, that the judge assumes them as a basis of argument, without suggesting to the jury their own and unquestionable right, that they are to determine as to the truth of the facts alleged. But an ultimate reference to the opinion of the jury, as to any such facts, is always understood to be implied. If the court in their direction, should undertake to give a decided opinion, as to the truth of an alleged fact, which is contested, it would undoubtedly be wrong, from its probable influence on a jury, though the right of the jury, notwithstanding such direction, would remain unimpaired." Nason *v.* U. S., 1 Gall. 53.

Justice Gray, in Vicksburg, &c., M. R. R. Co. *v.* Putman, 118 U. S. 545, said: "In the courts of the United States, as in those of England, from which our practice was derived, the judge, in submitting a case to the jury, may, at his discretion, whenever he thinks it necessary to assist them in arriving at a just conclusion, comment upon the evidence, call their attention to parts of it which he thinks important, and express his opinion upon the facts; and the expression of such an opinion, where no rule of law is incorrectly stated, and all matters of fact are ultimately submitted to the determination of the jury, cannot be reviewed on a writ of error. The powers of the courts of the United States in this respect are not controlled by the statutes of the State forbidding judges to express any opinion."

Again the same justice, in U. S. *v.* Reading R. R., 123 U. S. 114, said: "Trial by jury in the courts of the United States, is a trial presided over by a judge, with authority, not only to rule upon objections to evidence, and to instruct the jury upon the law, but also, when in his judgment the due administration of justice requires it to aid the jury by explaining and commenting upon the testimony, and even giving them his opinion upon questions of fact, provided only he submits those questions to their determination." See note in 14 Am. St. Rep. 36.

stage of the trial, and especially in his instructions to the jury, use language from which the jury may understand what conclusion he may have reached upon controverted facts, or with respect to the credit of witnesses.[1] To be entirely free from objection the charge must not be in the form of a direction as matter of law, but merely advisory. The jury is the constitutional tribunal for the determination of questions of fact, and justice is better administered when courts refrain altogether from any interference with its rightful province. Jurors cannot distinguish between a direction in a matter of law or fact. They are bound to take the law from the court; and a positive direction from the bench, as to a question of fact, is as potent as if it pertained to a question of law; and even an expression of opinion calculated to influence the decision of the jury in a matter clearly within their cognizance, should be critically scrutinized.[2] It would be highly improper for a judge to discuss evidence sneeringly, or in a way tending to discredit it.[3] Some matters relating particularly to the evidence will be noticed in the succeeding sections.

Sec. 662. Same, continued—The credibility of witnesses.—The competency of witnesses and evidence is decided by the court, while their credibility rests peculiarly within the province of the jury, who, guided by the rules of law relating thereto, must determine the weight and effect of the testimony given.[4] The jury may be instructed what things they may consider in determining the credit to be given a witness. The court cannot charge the jury that certain things will or will not affect the credibility of a witness,[5] or that they are not at liberty to believe a witness, but should only give general rules by which the credibility is to be judged.[6] For example, the jury may be told that the "credit" to be given to the testimony of a witness may depend upon his ability and opportunity to know what occurred and his disposition to tell the truth.[7] So may they be instructed as to what effect the interest which a witness may have in the result of the suit may have upon his credibility. This is not necessarily one of

[1] State *v.* Hardy, 7 Neb. 377; Fuhrman *v.* Mayor, 54 Ala. 263.

[2] Allis *v.* Leonard, 58 N. Y. 288. The jury must determine the effect of the evidence. Patterson *v.* Hayden, 11 Am. St. Rep. 822.

[3] Cross *v.* T. M. & M. Co., 121 Pa. St. 387.

[4] Hodge *v.* Buffalo, 1 Sheld. 418; Kansas, &c., Ry. Co. *v.* Little, 19 Kan. 267; Mack *v.* State, 48 Wis. 286; Evans *v.* George, 80 Ill. 51; Mechelke *v.* Bramer, 59 Wis. 57.

[5] Allis *v.* Leonard, 58 N. Y. 288; Brott *v.* Catlin, 47 Barb. 404; Leibig *v.* Steiner, 94 Pa. St. 466. They should be instructed that it is their duty to consider the evidence and decide as they think the truth requires, 58 N. Y. 288.

[6] Mercer *v.* Wright, 3 Wis. 645; Knowles *v.* People, 15 Mich. 411.

[7] Williams *v.* Davis, 54 Ill. App. 198.

the tests for determining the credibility, but may be considered.[1] So may the jury be charged that where the evidence shows that a witness has been convicted of a criminal offense, this fact may be taken into consideration in determining credibility.[2] So may the court instruct the jury that the good character of one accused of crime may be considered,[3] though it would be error to charge that evidence of good character can only be considered in doubtful cases,[4] or that it is entitled to less weight where the question is one of great criminality, than upon an accusation of a lower grade.[5] So may the jury be cautioned to weigh the testimony of an accomplice cautiously,[6] or instructed how to consider the testimony of an impeached witness. It cannot be charged that the jury must disregard the evidence of an impeached witness if they believe that he has been successfully impeached,[7] nor that the testimony of an impeached witness is of no value unless corroborated,[8] as the testimony of such a witness must be weighed by the jury. It is for them to say whether or not he has told the truth in the particular case. They are the sole judges of his credibility.[9] The jury may properly be instructed how to consider the testimony of a witness who has falsely testified,[10] so the jury may properly be instructed where

[1] Williams *v.* Jno. Davis Co., 54 Ill. App. 198. They may be instructed that the interest of persons related to one on trial for a crime may be considered, if the question of the credibility of the witnesses in general is fairly presented to the jury. People *v.* De France, 28 L. R. A. 139. In a criminal case they may be instructed that where the defendant is a witness in his own behalf, they may consider this fact in determining his credibility. State *v.* Maguire, 69 Mo. 197; State *v.* Zorn, 71 Mo. 417. See Whittaker's Code of Ev., sec. 218 *et seq.*

[2] Conkey *v.* Carpenter, 106 Mich. 1. Conviction of forgery, perjury and offenses affecting the administration of justice may be shown for this purpose. Webb *v.* State, 29 O. S. 351.

[3] Griffin *v.* State, 14 O. S. 56; Whittaker's Code of Ev., p. 211.

[4] Stewart *v.* State, 22 O. S. 477.

[5] Harrington *v.* State, 19 O. S. 264.

[6] Whiting *v.* State, 48 O. S 220, 236; Pease *v.* Smith, 61 N. Y. 483; White *v.* McLean, 47 How. Pr. 199.

[7] Sharp *v.* State, 16 O. S. 219; Smith *v.* Grimes, 43 Ia. 356; Rider *v.* People, 110 Ill. 11; Pennsylvania Co. *v.* Conlan, 101 Ill. 95.

[8] Green *v.* Cochran, 43 Ia. 544.

[9] Cases cited in two last notes. State *v.* Miller, 53 Ia. 209; Smiley *v.* Dewey, 17 O. 156, 160.

[10] If any witness has willfully sworn to a falsehood, the jury may be instructed that they may, but are not compelled to discredit his testimony. Crabtree *v.* Hagenbaugh, 25 Ill. 233; People *v.* State, 59 Cal. 367; Chambers *v.* People, 105 Ill. 409; Roth *v.* Wells, 29 N. Y. 471. They may discredit his testimony unless he is corroborated. Goeing *v.* Outhouse, 95 Ill. 346.

"The maxim '*falsus in uno falsus in omnibus*,' is, in a common-law trial, to be applied by the jury according to their own judgment for the ascertainment of the truth, and it is not a rule of law in virtue of which the judge may withdraw the evidence from their consideration, or direct them to disregard it altogether." The jury should be instructed that they may disregard it altogether; but that the credibility is for the consideration and decision of the jury, and they may give such weight to the evidence as it deserves in their opinion. Mead *v.* McGraw, 19 O. S. 55; Stoffer *v.* State, 15 O. S. 47. The maxim does not operate to preclude the jury from believing the witness if they choose to do so. *Id.* See also Dye *v.* Scott, 35 O. S. 194.

the evidence is palpably contradictory, that they might disregard, in whole or in part, the testimony of any witness whom they believed had willfully sworn falsely to any fact in the case.[1] The jury should not be instructed that a witness having superior opportunities for knowing what took place and superior intelligence and memory, other things being equal, is entitled to greater weight,[2] nor should a judge express or intimate any opinion as to the credibility of a witness.[3] The jury may be instructed that the affirmative testimony of one witness to the existence of a fact is entitled to negative testimony of a witness to the non-existence of such fact.[4]

Sec. 663. Instruction as to the weight and effect of evidence.—Not very much can be added under this heading to what was stated in the discussion of the right of the court to sum up the evidence, or to charge the jury as to the credibility of the witnesses. The court may give expressions of opinion relating especially to the weight of evidence which do not concern or is not included in the matters touched upon in the previous sections. In civil cases the jury must be instructed that they are to find for one side or the other by a preponderance of evidence, and the court must explain to them what "preponderance of evidence" means. In criminal cases they must be instructed that before the accused is found guilty they must be satisfied as to his guilt beyond a "reasonable doubt"; what is meant by that term must, therefore, be explained to them. In what instances they are to be guided by either of these methods in reaching their conclusions must be pointed out to them by the charge. It is altogether improper for the court to weigh the evidence and draw the inference for the jury,[5] or express any opinion whatever with reference thereto,[6] and especially to take from the jury all discretionary power, by an absolute instruction as to the party for whom their verdict should be found,[7] nor intimate that the verdict should be for the one side or the other under certain conditions.[8] For instance, an instruction that "upon all the evidence, if believed, plaintiff is not entitled to recover," is an improper expression as to the weight.[9] It is not necessary to discuss again in this place what is meant by "preponderance of evidence" or "reasonable doubt," or what should

[1] Miller *v.* Madison Car Co., 130 Mo. 517.

[2] Williams *v.* Jno. Davis Co., 54 Ill. App. 198.

[3] Sharp *v.* State, 14 Am. St. Rep. 27 and note.

[4] Toledo Con. St. R. Co. *v.* Rohner, 9 O. C. C. 702. See sec. 590, *post*.

[5] Smith *v.* Collins, 94 Ala. 394; Bonney *v.* Weir, 51 Ill. App. 380.

[6] Tyler *v.* Railroad Co., 88 Va. 389.

[7] Hollenbeck *v.* McMahon, 28 O. S. 1.

[8] Bonney *v.* Weir, 51 Ill. App. 380.

[9] Sherrill *v.* Western Union Tel. Co., 116 N. C. 655.

be charged with reference thereto, as that has been sufficiently done elsewhere.[1]

Sec. 664. Making special reference to particular evidence.—To single out particular portions or isolated parts of the testimony, and give undue prominence thereto, while other portions which are equally as important are entirely passed, or given but slight attention, may be as harmful or prejudicial as the direct expression of an opinion, and such a course on the part of the court has a tendency to mislead the jury, and is clearly erroneous.[2] For example, upon a question as to whether or not authority has been conferred upon an agent to sell property, it is error for the court to select a few of the words claimed to give such authority, and instruct the jury that these words do not confer such authority.[3] If the court undertakes to charge the jury upon what state of facts they must find a verdict, the instruction should include all the facts in controversy, material to the right of the plaintiff or the defense of the defendant.[4]

Sec. 665. Requests when made and given.—The general charge, as it may appropriately be termed, is given after the argument is concluded.[5] The statute in civil cases provides that: When the evidence is concluded, either party may present written instructions to the court on matters of law, and request the same to be given to the jury, which instructions shall be given or refused by the court before the argument to the jury is commenced.[6] The criminal code provides that: When the evidence is concluded, either party may request instructions to the jury on points of law, which shall be given or refused by the court, which instructions shall be reduced to writing if either party requests it.[7]

These two sections govern and point out the order of procedure of a trial. The question to be decided is whether or not the requests to charge must be given before the argument begins or after it is concluded. The language between the two provisions is different. In the civil statute it reads very plainly that they shall be given before the argument is commenced, while in the criminal provision there is an absence of language

[1] See *ante.*, secs. 587, 588. See also Kinkead's Instructions, Nos. 158, 187.

[2] Morgan *v.* State, 48 O. S. 371; Flowers *v.* Flowers, 92 Ga. 688; L. & N. R. R. Co. *v.* Hurt, 101 Ala. 34; Wadsworth *v.* Williams, 101 Ala. 265; Chandler *v.* Jost, 96 Ala. 596; Lincoln *v.* Beckman, 23 Neb. 677; Marion *v.* State, 20 Neb. 244; Bank *v.* Lowry, 36 Neb. 290; McFadin *v.* Catron, 120 Mo. 252.

[3] Gross *v.* Shaffer, 29 Kan. 442.

[4] Gallagher *v.* Williamson, 23 Cal. 331.

[5] R. S., sec. 5190, par. 7.; R. S. sec. 7300, par. 7.

[6] *Id.*

[7] R. S., sec. 7300.

to that effect. The authorities in the courts of inferior jurisdiction have not been harmonious in the matter, some holding that if the requests are made before the argument is commenced they *must* be given then. The question naturally arises whether or not the general rule giving the court a discretionary power over the course of procedure may be called to aid in the solution of the matter. There is no doubt as to the correctness of the proposition, at least in civil cases, that the court is invested with a discretionary power to change the regular order of procedure. Whether or not this power is conferred upon the court in criminal procedure is not so clear. In Ohio, it will be remembered that all criminal procedure is purely statutory—that courts must act according to the power conferred by the criminal statutes.[1]

There is a point of difference between the two sections referred to governing the procedure in civil and criminal matters. At the beginning of the civil statute the power is conferred upon the court "to otherwise direct the order of the proceedings," while this clause does not appear in the criminal provision. The considerations mentioned should, if necessary to a decision, have an important bearing in determining the subject of this section. It is a matter of statutory construction, and the rules governing construction of statutes must be considered. The word "shall" is sometimes not considered as rendering a statute mandatory, but may be regarded as having the same effect as "may."[2] Where that is so the court is invested with discretionary power. As already stated, the courts in Ohio have not been in accord in the construction of these sections of the statutes. The supreme court has until very recently, as we shall presently see, only incidentally touched upon the question, and the circuit court decisions are arrayed against each other. But as it is of a low order of argument to count authorities upon one side or the other of a question, we shall not do so. In the first part of paragraph 5 of the civil statute, the word "may" is used, "when the evidence is concluded, either party may present written instructions," etc., and in the latter part the word "shall" is used, "which instructions shall be given or refused by the court before the argument is commenced." The word *shall* may be read *may*, thus making the statute *directory* merely, and the power of the court over the matter consequently discretionary. Some of the lower courts have pronounced this to be the more

[1] Mr. Bishop says: "In judicial procedure there are many things which in their nature cannot be subjected to exact rule; necessarily, therefore, they follow the discretion of the judge. But so far as possible he regulates the discretion by rule." Bishop's New Cr. Pr., sec. 6. It is believed that in Ohio this matter is viewed somewhat differently from other States.

[2] State *v.* West, 3 O. S. 509.

reasonable construction, but it is not the construction finally concluded upon by our courts of last resort. As to the criminal statute, its language certainly does not warrant the conclusion that the instructions are to be given before argument. In the note the various precedents appear from which deductions may be drawn.[1]

Since writing the above the question has reached the supreme court, and it has been decided that the parties have the right under the statute to have such correct written instructions as may be requested given to the jury before argument, but before there can be error the record must affirmatively show that the court was requested to give such instructions before argument, and that exceptions were taken to the refusal.[2] And it is said that, "there is no express provision for asking a general one, but the practice is uniform, so far as we know, to do so, and we think it is recognized in numerous cases, and is a wise and reasonable one. Counsel are authorized to wait and see what the charge is, and if it is not satisfactory, or anything be omitted, then to call the attention of the court to such points, and request charges."[3]

[1] The refusal to give request is prejudicial error unless the court otherwise directs. It may be to the decided advantage of a party to have a charge given before the argument proceeds. Root *v.* Monroeville, 9 Toledo Leg. News, 208; Kinkead's Code Pldg., sec. 1240. The instructions, if law applicable to the case, must be given when the request is made. To refuse is error. McHugh *v.* State, 42 O. S. 154, 165. The real controversy in this case was, however, more particularly as to the form and substance of the requests. It is assumed in Foy *v.* Street Ry., 10 O. C. C. 151, 154, that the requests shall be given before the argument, and that such written requests may be sent to the jury even though the general charge is an oral one.

It is held in Caldwell *v.* Brown, 9 O. C. C. 691, that when the instructions referred to in the statute, par. 5, are requested before the argument, they must be given at that time if given at all.

The statute is not mandatory even in a criminal case. In a civil case it is a matter of discretion with the court whether the instructions are given before or after argument. Duvall *v.* Fuhrman, 3 O. C. C. 305 (affirmed by agreement, 19 W. L. B. 424). The circuit court of Hamilton County in two cases, following, as they claim, McHugh *v.* State, *supra*, hold that under the criminal statute it is plain that if a proper charge is asked to be given before argument, it must be then given, either in the form in which it is presented or in substance in other language, and that it is error to refuse it. McGuire *v.* State, 3 O. C. C. 558.

Sec. 7300 of the criminal code, it is claimed by some, warrant the view that the requests must be given before the argument begins. Umbenhauer *v.* State, 4 O. C. C. 378, 385–7, affirmed 23 W. L. B. 176, holds that the section does not warrant this construction, nor that the case of McHugh *v.* State, 42 O. S. 162, does not so hold, and that it is not error for the court to refuse to instruct the jury before the argument begins. That the design is to give the court opportunity and time, without unnecessary delay of the trial, to prepare instructions. To same effect is Blackburn *v.* State, 23 O. S. 165. See also discussion in Thompson on Trials, secs. 2358, 2359.

[2] Monroeville *v.* Root, 54 O. S. 523.

[3] Venable *v.* State, 1 O. C. C. 301. See also sec. 666, *post*, exceptions. At the conclusion of the charge a party may ask for instructions on matters omitted in the charge, or as to matters which are thought to be erroneous. Brick *v.* Bosworth, 162 Mass. 334.

Sec. 666. Rules governing the giving of requests.—Formerly requests in civil cases could have been made orally. Now they must be made in writing.[1] In criminal cases the request must be reduced to writing if either party request it.[2] When requests shall be given was discussed in the preceding section.[3] The rules regulating the giving of requests for instructions to the jury are not different in civil and criminal cases, excepting as to the time when they shall be given, as it has now been decided all requests in civil cases, when so desired by parties, must be given before the argument proceeds. In criminal cases under the language of the statute, it has been decided not to be error to refuse a request before argument begins.[4] The criminal code does not contain the language which is found in the civil code, requiring in terms, a court to give the request before the argument begins. It is most convenient, possibly, for the court to have an opportunity, while the argument progresses, to examine and consider the requests and compare them with the charge which he desires to make. On the other hand, there is something to be gained by counsel by having the request given or refused before the argument proceeds, because in that event the action of the court may enable counsel to determine the line of argument which may be taken. If counsel know that the court has given charges which have been requested, then the case can be argued upon that theory, but if the request is refused some other theory may have to be adopted. It is a well settled rule that if the court does give the substance of the request in other language in the general charge there can be no complaint.[5] The court is not bound to charge in the language of the request, however sound in law or pertinent in the case the proposition may be.[6]

The court must strike out and refuse to give any matter contained in the request that is not good law;[7] and may amend or modify them in accordance with the law;[8] and should refuse all specific instructions, though correct under a different state of facts.[9] And so with one based upon an imperfect statement of the facts of the case and which excludes from the jury matters in evidence,[10] or one upon immaterial or irrelevant questions,[11]

[1] Code, sec. 5190; Foy *v.* Street Ry. Co., 10 O. C. C. 151.

[2] R. S., sec. 7300.

[3] See *ante*, sec. 665.

[4] Umbenhauer *v.* State, 4 O.C.C. 378.

[5] McGuire *v.* State, 3 O. C. C. 551; Bond *v.* State, 23 O. S. 349; Stewart *v.* State, 1 O. S. 66; L. S. & M. Ry. Co. *v.* Kelley, 10 O. C. C. 327.

[6] 42 O. S. 154. The court may choose any correct form of words. Bond *v.* State, 23 O. S. 349; State *v.* Stout, 49 O. S. 270. It is said to be best to give an acceptable request in *haec verba*. McGuire *v.* State, 3 O. C. 551. The same effect in Cook *v.* Brown, 4 Am. St. Rep. 870.

[7] Avery *v.* House, 2 O. C. C. 247.

[8] Horton *v.* Williams, 21 Minn. 187.

[9] Callahan *v.* State, 21 O. S. 306.

[10] Jenkins *v.* Ry. Co., 2 Disn. 49.

[11] Carlisle *v.* Foster, 10 O. S. 198.

or one embracing a mere abstract question of a law,[1] or one which is uncertain, indefinite, ambiguous, misleading or self-contradictory,[2] or one which wholly ignores a material claim of plaintiff upon which substantial proof has been offered.[3] Where a series of instructions are asked, they should be construed together;[4] and where the series are connected propositions some of which are law and some not, they may be properly refused.[5] The court cannot give disconnected and separate requests made by both plaintiff and defendant, without also giving a general charge in its own language;[6] nor should the court give a request in this manner: "We give you the following as correct propositions of law except so far as modified by the general charge of the court."[7] Where a party presents to the court a written request for instructions to the jury, unless he is entitled to have it given in terms in which it is expressed, there can be no error in its refusal.[8] A party having asked a special charge, which was refused, and also a special finding, if such finding shows that refusal to charge as asked could not have been prejudicial, such refusal is not ground of error.[9] Where a charge is correct so far as it goes, but might be made more complete and specific, it is the duty of counsel who deem more specific instructions necessary, to request that the same shall be given.[10] A refusal to correct a charge which could not have aided a party is not error.[11]

Sec. 667. Comments of judge on requests.—A remark by the trial judge in refusing to charge the jury certain requests handed him by one of the parties, that the same do not conform to his view of the law, made in the hearing of the jury, are not such comments as the statute does not authorize, and does not constitute reversible error.[12]

Sec. 668. When charge to be in writing.—Charges to the jury in either civil or criminal causes, are to be reduced to writing by the court, only when either party, before the argument to

[1] Railway Co. *v.* Fleming, 30 O. S. 480.

[2] Insurance Co. *v.* Reed, 33 O. S. 288; Miller *v.* Florer, 19 O. S. 356; Adams *v.* State, 29 O. S. 412; Leroy, &c., Ry. Co. *v.* Ross, 40 Kan. 598. If the attention of the court is called to the ambiguity before the jury have acted upon it, it is the duty of the court to make the meaning plain. B. & O. Ry. Co. *v.* Boyd, 1 Am. St. Rep. 362.

[3] L. S. & M. S. Ry. Co. *v.* Winslow, 10 O. C. C. 193.

[4] Railway Co. *v.* Terry, 8 O. S. 570.

[5] Inglebright *v.* Hammond, 19 O. 337.

[6] Bowman *v.* Fuher, 11 O. C. C. 231.

[7] Avery *v.* House, 2 O. C. C. 247.

[8] Railroad Co. *v.* Schultz, 43 O. S. 270. See also Elliott's Gen. Pr., sec. 896, n. 2, p. 1064, and cases supporting the same.

[9] Montgomery *v.* Swindler, 32 O. S. 324.

[10] Railway Co. *v.* Murphy, 50 O. S. 135, 145.

[11] Chase *v.* Washburn, 1 O. S. 244.

[12] L. S. & M. S. Ry. Co. *v.* Ford, 18 O. C. C. 239.

the jury is commenced, requests it. Such written charges are not permitted to be orally qualified or modified in any manner, or in any manner explained to the jury by the court.[1] All requests in civil cases must be in writing,[2] but not so in criminal cases. Those in criminal cases are required to be in writing only when either party requests that it shall be in writing, before argument.[3] The safer and better practice is for counsel to prepare and present their requests in writing in all cases, although when the case is being officially reported a record is made of the requests made, but that does not comply with the statute requiring them to be in writing when the request is made.

The language of the statute is imperative, vesting the court with no discretionary power in the matter.[4] When a request has been made to have the instructions reduced to writing, it must be done; the court cannot reduce part to writing and give the remainder orally.[5] Under a statute requiring written instructions to be given before argument, it has been held not a compliance to give the same orally, and have them taken down by a stenographer.[6] There could be no objections to such a course if they were transcribed at once so as to let the jury take them on their retirement, and have the same before their deliberations upon a verdict commenced, though this may be somewhat if not entirely impracticable.

But it is not essential to the validity of a written charge that the judge should have written every part of it; he might write part and adopt the charge of another judge in whole or in part; he might incorporate extracts from law books where entirely applicable, dictate the whole of it to an amanuensis before delivery, and then read his copy, or have it printed and read from slips. The main idea is, did the judge adopt it as his charge, and was it in such connected form as to enable the jury to read it on their retiring?[7] The statute is not complied with if the instructions are disconnected and not in such form as that the jury may properly read it.[8] In criminal cases where there has been no written general charge given or requested, but written charges are given at the conclusion of the general charge, such additional written charges do not fall within the written charges contemplated by the statute entitling the parties to

[1] R. S., secs. 5190, 7300.

[2] R. S. sec. 5190.

[3] R. S., sec. 7300; Blackburn *v.* State, 23 O. S. 146.

[4] The O. & M. R. R. Co. *v.* Sauer, 4 O. C. C. 466.

[5] The O. & M. R. R. Co. *v.* Sauer, 4 O. C. C. 466; Householder *v.* Granby, 40 O. S. 430. To refuse would be error. Hardy *v.* Turner, 9 O. S. 400.

[6] Crawford *v.* Brown, 40 Pac. 692; 21 Colo. 272; Frye *v.* Ferguson, 6 S. D. 392.

[7] Railroad Co. *v.* Sauer, 4 O. C. C. 466.

[8] The O. & M. R. R, *v.* Sauer, 4 O. C. C. 466.

have them sent to the jury as written instructions.[1] If the court after having read a written charge to the jury adds a verbal instruction, upon exception being made thereto, after the jury have retired, he may properly recall them, reduce the same to writing and then read it to them.[2] When the instructions have been given in writing, and the jury return after retirement for additional instructions, the same should also be in writing.[3] For any irregularities in the giving of instructions contrary to the prescribed modes, exceptions must be taken at the time.[4]

Sec. 669. Written charges to be sent to jury-room.—The statute provides in both civil and criminal procedure that all written charges and instructions shall be taken by the jurors in their retirement, and returned with their verdict into court, the same to remain on file with the papers in the case.[5] The question arising for solution under this provision is what is meant by "all written charges and instructions." There is the general charge which is to be written when requested by either party before argument is commenced; also the request in civil cases which must always be written;[6] and the special requests in criminal cases which are to be in writing if either party so requests, for it has been held by the supreme court that special instructions in criminal cases given to the jury, in writing after argument, are not to be taken by the jury in their retirement, where the principal charge is not in writing.[7]

On the other hand, it has been held in criminal cases that the statute under consideration is applicable to written instructions presented by the court at the close of the evidence and before the argument is commenced; that when such instructions are given to the jury, they should be sent to the jury whether the general charge was in writing or not.[8] But there is no good reason why there should be any distinction between an instruction given *before the argument is commenced*, and those given after argument. In civil cases they are both *written* instructions; and in criminal cases they are written when requested to be in that form. The conclusion must certainly be that the circuit court decisions are at variance with that of the supreme court, because the latter court has clearly decided (in a criminal case) that special written instructions given in addition to a general

[1] Hurley *v.* State, 4 O. C. C. 425; Griffin *v.* State, 34 O. S. 299.

[2] Little Miami R. R. Co. *v.* Washburn, 22 O. S. 324.

[3] Bowden *v.* Achor, 22 S. E Rep. 254; 95 Ga. 243.

[4] Little Miami R. R. Co. *v.* Washburn, *supra*.

[5] R. S., secs. 5190, 7300.

[6] *Ante*, sec. 666.

[7] Griffin *v.* State, 34 O. S. 299, 303, 304; Hurley *v.* State, 4 O. C. C. 425.

[8] Foy *v.* Street Ry. Co., 10 O. C. C. 151; Caldwell *v.* Brown, 9 O. C. C. 691.

oral charge, in the absence of a request for a written charge, is not required to be taken by the jury in their retirement.[1] When the general charge is a written one and there are additional special instructions given by request, it becomes one entire charge,[2] and falls within the meaning of the language of the statute, "all written charges and instructions," which must go to the jury.[3] The construction of the statute in the light of the adjudication of the supreme court is that "all written charges and instructions" means those last mentioned, namely, a written general charge and special written instructions in addition thereto; and that it is only when there has been a request that the general charge shall be in writing that it shall go to the jury. It would be manifestly unfair that special written instructions should be sent to the jury when the main and general charge has been orally given; the latter may contain, as it naturally would, the most essential part, and the jury would have, perhaps, only immaterial written instructions before them and be unable to remember clearly that which was given orally.

So where there has been no request that the general charge be reduced to writing, but the court nevertheless does so for its own convenience, the right to have it sent to the jury is believed not to exist.[4] The party demanding a written charge may waive his right to have it sent to the jury.[5]

Sec. 670. Misleading instruction, not precise or explicit—Effect of.—The effect of a charge which is so framed as to mislead the jury in any material matters, as to the real issues involved,[6] or when stated in such form as to be misleading,[7] or as to confuse the jury upon the law of the case,[8] or one from which the jury might draw incorrect inferences,[9] or one which contains mere extracts from opinions in other cases having no reference to the issues,[10] or one which states mere abstract propositions of law,[11] will be reversible error. But to take advantage of any errors in these respects it is the duty of counsel to call the attention of the court directly to it.[12] An objection that the charge is too general, and not specific and particular, is not available unless the court, at the time the charge is given, is prop-

[1] Griffin *v.* State, 34 O. S. 299; Hurley *v.* State, 4 O. C. C. 425.

[2] Griffin *v.* State, *supra.*

[3] Griffin *v.* State, *supra.*

[4] P & E. R. R. Co. *v.* Bishop, 13 O. C. C. 380.

[5] The O. & M. R. R. Co *v.* Sauer, 4 O. C. C. 466.

[6] Steel *v.* Kurtz, 28 O. S. 192.

[7] Oliver *v.* Sterling, 20 O. S. 391.

[8] Insurance Co. *v.* Ins. Co., 5 O. S. 450.

[9] Little Miami R. R. Co. *v.* Wetmore, 19 O. S. 110.

[10] M. & C. R. R. Co. *v.* Picksley, 24 O. S. 654.

[11] Coal Co. *v.* Estievenard, 53 O. S. 43.

[12] Railway *v.* Murphy, 50 O. S. 135, 145.

erly requested to be more specific, and declines to do so.[1] This may not be so now, under the statute providing for a general exception.

Sec. 671. Curing errors occurring during trial by instructions.—Errors may occur during the trial which may be cured by instructions to the jury. For example, the effect of the admission of incompetent evidence may be done away with by a charge to the jury requiring them to disregard it entirely.[2]

Sec. 672. Charging abstract propositions of law.—A charge to the jury should be a plain, distinct, and unambiguous statement of the law as applicable to the case made before the jury by the proofs, and not mere abstract rules of law which are in no way applicable to the case.[3] Hence requests for instructions containing abstract propositions of law may be properly refused.[4] By an abstract instruction is meant the statement of an abstract proposition of law which is irrelevant to the issues on trial.[5] There is a clear distinction between abstract propositions of law and the hypothetical state of facts which there is no evidence tending to prove,[6] and a hypothetical case, by way of illustration, can be stated by the court;[7] but the jury in such a case should be instructed that it is given *solely* for an illustration.[8] But the verdict will not be disturbed when abstract propositions of law are given upon points not involved, if it appears from the whole charge that the jury could not have been misled thereby.[9] The court cannot properly add to a charge which is requested and which may properly be given, a material qualification, based on a state of facts purely conjectural.[10]

[1] Pennsylvania Co. *v.* Rossman, 13 C. C. 111.

[2] Henkle *v.* McClure, 32 O. S. 202; Crandall *v.* Cuyler, W. 378; Mimms *v.* State, 16 O. S. 221.

[3] Parmlee *v.* Adolph, 28 O. S. 10. "It is always proper for courts engaged in the trial of cases to avoid giving to the jury mere abstract propositions of law, however correct they may be, and it is often their imperative duty to refuse to give them if requested." P. Ft. W. & C. R. R. *v.* Slusser, 19 O. S. 162.

Not the general law of the subject, but the legal rules governing the facts in the case shall be given. Bish. N. Cr. Pr., sec. 978, p. 4.

[4] Corbett *v.* State, 5 O. C. C. 155; Wheelan *v.* Kinsley, 26 O. S. 131, 137; Davis *v.* State, 25 O. S. 369, and numerous other cases.

[5] Thompson on Trials, sec. 2321.

[6] *Id.*

[7] Gage *v.* Payne, W. 678. It is doubtless true, that the judge should not charge the jury upon a hypothetical case, entirely without testimony, because such a course is calculated to mislead the jury and induce them to suppose that such a state of facts, in the opinion of the court, was possible under the evidence and might be considered by them. But where there is any evidence, tending to prove the fact which the charge assumes, the court may properly make it the subject of comment. From opinion in Breese *v.* State, 13 O. S. 155.

[8] Thompson on Trials, sec. 2321, 2315.

[9] Schneider *v.* Hosier, 21 O. S. 98; Stewart *v.* State, 1 O. S. 66.

[10] Bain *v.* Wilson, 10 O. S. 14.

Sec. 673. Reading from decisions and statutes.—It is not improper to read extracts from reports of decisions, or statutes, or excerpts from text-books to the jury as part of the charge, if they are applicable to the case, and that is made to appear by the charge.[1]

Sec. 674. Further instructions when jury disagree.—The statute provides that after the jurors have retired for deliberation, if they desire to be informed as to any part of the law arising in the case, they may request the officer to conduct them to the court, where the information upon the matter of law shall be given.[2] This applies as well to criminal procedure.[3] The court may properly inquire of the jury as to the cause of their disagreement, and if in his opinion it is necessary, may restate his views of the law or may give additional charges in the presence of the parties and counsel.[4] Such instructions should be given in open court and not during a recess.[5] The right of parties and counsel to be present when such additional instructions are given is discussed in the next section.

Sec. 675. Same, continued—Presence of parties and counsel when further instructions given after submission.—The parties or their counsel have the right to be present in civil cases during the giving of the additional instructions mentioned in the last section, and it is error to give additional charges after final submission without the presence of the parties or their counsel;[6] although the court in such cases may, *during the session* of the court, after the parties or their counsel have been loudly called for, give such additional instructions,[7] or after a search for them has been made in the court-rooms.[8] But it is very much doubted whether the doctrine in the last two paragraphs would be adhered to as a general rule of practice applicable alike to all localities. It certainly could not prevail with justice in the larger places, where the custom of calling counsel cannot possibly be followed. A telephonic communication which actually reaches counsel might justify the court in proceeding with the charge in his absence after a sufficient length of time. The statute seems by its terms to permit the additional instructions after notice to the parties or their counsel.[9] But it is clearly erroneous for the court to give the jury further instructions at their request, in the

[1] State *v.* Ward, 61 Vt. 153; Jones *v.* State, 65 Ga. 506; Holley *v.* State, 75 Ala. 14.

[2] R. S., sec. 5194.

[3] Hulse *v.* State, 35 O. S. 421.

[4] Solomon *v.* Reis, 5 O. C. C. 375.

[5] Campbell *v.* Beckett, 8 O. S. 211.

[6] Campbell *v.* Beckett, 8 O. S. 210; Seagrave *v.* Hall, 10 O. C. C. 395; 3 Ohio Dec. 221.

[7] Preston *v.* Bowers, 13 O. S. 1.

[8] Emery *v.* Whitaker, 2 C. S. C. R. 36.

[9] R. S., sec. 5194.

absence of counsel, without having made an effort to secure their presence.[1] As stated in a preceding section the requirements of the civil statute applied to criminal procedure.[2] And there is of course very much more reason why all the rules hereinbefore stated should apply to criminal procedure, as the accused must be personally present during the whole course of the trial. In a felony case, the prisoner has the right to be present whenever any proceeding is taken, such as calling out the jury to ascertain what progress is being made.[3] An instruction given after final submission, upon the jury returning into court, even though in the presence of counsel but in the absence of the prisoner, is erroneous.[4] The right of the prisoner to be present when such additional instructions are being given cannot be waived.[5]

Sec. 676. Stating recollection of evidence to jury after retirement.—After the jurors have retired for deliberation, if there be a disagreement between them as to any part of the testimony, they may request the officer to conduct them to the court, and the court may give its recollection as to the testimony on the point in dispute, in the presence of, or after notice to, the parties or their counsel.[6] This has been held applicable to criminal cases,[7] although in such cases it is essential that the accused himself be present. Notice to him merely would not warrant the court giving to the jury his recollection of the evidence in the absence of the accused.[8] It has been held under a similar statute that the reading of the testimony by the official stenographer will be a compliance with the statute.[9]

Sec. 677. Exceptions to charge.—By a recent amendment it is provided that a general exception taken to any charge of any court to any jury shall apply to any and all errors of law which may exist in such charge that are material and prejudicial to the substantial rights of the party excepting.[10] The object of an exception is said to be, that the court particularly, and the opposing counsel also, may be advised thereof, so that if desired by the court, steps may be taken to correct the error or mistake,

[1] Kuhl *v.* Long, 15 So. 267; 102 Ala. 563; Seagrave *v.* Hall, 10 O. C. C. 395, 399. In the last case it was claimed that the bailiff was instructed to telephone counsel, but no such notice was in fact received by counsel.

[2] *Ante*, sec. 674; Hulse *v.* State, 35 O. S. 421.

[3] Bennett *v.* State, 10 O. C. C. 84.

[4] Jones *v.* State, 26 O. S. 208; Sutcliffe *v.* State, 18 O. 469.

[5] Jones *v.* State, *supra.*

[6] R. S., sec. 5194. *Ante*, sec. 621.

[7] Hulse *v.* State, 35 O. S. 421.

[8] *Ante*, sec. 675.

[9] Darner *v.* Dagett, 35 Neb. 695.

[10] Code, sec. 5298; 93 O. L. 299.

as the case may be, if it appears to be made.[1] This was with reference to the old rule. A party should not sit by and see what appears to be an error committed and say nothing. He must except.[2] If a party apprehends that an instruction will produce an erroneous impression, it is his duty to ask for a modification or an explanation at the time, and before the case goes to the jury.[3] The general exception, now provided for, will only reach such questions as are involved in the charge as given, and will not cover points upon which there is a total failure to charge. Requests should be made after the charge has been delivered to cover such matters, and special exceptions taken if refused.

Notwithstanding the fact that the general exception may reach all errors in the charge as given, yet counsel may call the court's attention to them and ask to have them corrected if not embraced within his special requests. Before the statute providing for a general exception applicable to *any and all* errors, it was held that an objection to a charge, in that it was too general and not specific and precise, was not available unless at the time the charge was given, a request was made to make it more specific.[4] The statute was probably intended to cure this. The judge may very properly correct any errors or omissions when called to his attention, and may even recall the jury after their retirement, if he finds that he has made an error, and correct it. This he may do at any time before a verdict is rendered.[5] The necessity for the rule requiring exceptions to be taken before the jury, is thus made apparent. It has been held, however, that an exception made after the jury has risen, vacated their seats, and have nearly passed into the jury-room is not too late so long as the court has an opportunity to correct any error or mistake.[6]

If any objections are to be made for non-direction there may be additional requests made,[7] and, therefore, this must take place before the jury retire.

If the court overrules the objections made to the charge, to pave the way for a reviewal upon error, exceptions must be noted, which must be assigned in the motion for a new trial.[8]

[1] Salomon *v.* Reis, 5 O. C. C. 375, 377.

[2] Alexander *v.* Gardiner, 14 R. I. 15, 18.

[3] Des Marets *v.* H. W. L. & Co., 33 N. Y. Supp. 92.

[4] Pennsylvania Co. *v.* Rossman, 13 C. C. 111; Toledo Street Railway *v.* Mammet, 13 C. C. 591.

[5] Booker *v.* State, 76 Ala. 22. "The court has power at any time during the trial, to modify instructions already given or give and revoke them entirely, if upon reflection, he concludes that they are erroneous." Sittig *v.* Birkestack, 38 Md. 158; Jones *v.* Van Patten, 3 Ind. 107; Hall *v.* State, 8 Ind. 439.

[6] Salomon *v.* Reis, 5 O. C. C. 375.

[7] Sec. 666, *ante*.

[8] Murray *v.* State, 26 Ind. 141; Krack *v.* Wolf, 39 Ind. 88; Bills *v.* Ottumwa, 35 Ia. 107.

Sec. 678. Curing erroneous parts.—An incomplete or vague instruction may possibly be cured by another charge clearing away the obscurity,[1] but an erroneous instruction is not cured by another contradictory one.[2] Where the court in its general charge to the jury correctly states the general principles applicable to the cases of the kind on trial, but follows it by an erroneous specific instruction on a controlling point as to the legal effect of the case made by the evidence before the jury, which, if followed, misleads the jury, such erroneous specific charge is not cured by the general charge.[3]

Sec. 679. Construction of instructions.—Though this subject does not appropriately belong here, the rules governing the construction to be given a charge to the jury by a reviewing court, for the purpose of ascertaining whether or not the trial court erred, are nevertheless stated.

The rule is well settled that the instruction must be considered in its entirety, the general charge and the requests given or refused, must all be looked to for the purpose of determining whether there is error. Separate paragraphs cannot be detached and considered alone.[4] If the charge as a whole is correct, error cannot be based on certain expressions, which when standing alone are erroneous.[5] And if the language employed be capable of different constructions, that one will be adopted which will lead to affirmance of the judgment unless it fairly appears that the jury have been misled.[6]

Sec. 680. How brought before a reviewing court.—The manner of taking the charge of the court before the reviewing court has been pointed out in the author's former work on Pleading.[7] The whole charge should be incorporated into the bill of exceptions and not merely the parts objected to. This is made necessary because of the rule that in the construction of a

[1] Eckels *v.* State, 20 O. S. 508, 514; Heyl *v.* State, 109 Ind. 589; Salomon *v.* Reis, 5 O. C. C. 375.

[2] Chicago City Ry. *v.* Wilcox, 8 L. R. A. 494.

[3] Railway Co. *v.* Crouse, 30 O. S. 224. Although an erroneous instruction given to a jury be afterward qualified by using apt words to express the true rule on the subject, yet if, upon the whole charge, it be uncertain what the rule given, or intended to be given, in fact, was, the judgment should be reversed, for the reason that the jury may have been misled thereby. Street Railway Co. *v.* Stallman, 22 O. S. 2.

[4] Cleveland C. & C. R. R. Co. *v.* Terry, 8 O. S. 570; Blakeslee *v.* Ervin, 40 Neb. 130; Love *v.* Putnam, 59 N. W. 691; 41 Neb. 86; Stein *v.* Vannice, 62 N.W. 464; 44 Neb. 132; Board, &c., *v.* Nichols, 38 N. E. 526; 139 Ind. 611; Railway Co. *v.* Shannon, 4 O. C. C. 449. See Kinkead's Code Plg., sec. 1240.

[5] Sandell *v.* Sherman, 40 Pac. 493; 106 Cal. 373; Coble *v.* Eltzroth, 125 Ind. 429; Campbell *v.* Holland, 22 Neb. 588; Bartling *v.* Behrends, 20 Neb. 211; People *v.* McCallan, 103 N. Y. 587.

[6] People *v.* McCallan, 103 N. Y. 587.

[7] Sec. 1240.

charge, in determining whether there is error, the whole charge must be considered and not the separate parts objected to ; and if a charge as an entirety is correct, error cannot be predicated upon certain expressions or paragraphs standing alone.[1] Not only should the entire charge be made part of the bill of exceptions, but also all the evidence taken upon trial, as it may be necessary to consider the evidence in connection with the charge. Error is, *prima facie*, presumed from an erroneous instruction as to a material issue.[2] And it has been held that the judgment should be reversed, where the record does not disclose all the evidence, and although it does not appear that the defendant was prejudiced,[3] and although the weight of the evidence may seem to support the verdict.[4] This does not seem sound, as only prejudicial error warrants a reversal of a judgment, and this should apply to error occurring in the charge of the court, and it has been so held.[5] If this be so, then the evidence ought also, as it generally is, to be brought up in the bill of exceptions.

The error must also be incorporated in the motion for a new trial, or it will not be considered by a court of error unless for some special or particular reasons, affirmatively appearing upon the record.[6]

Error predicated upon the action of the court in seeking a verdict, which action appears upon the journal, cannot be considered by a reviewing court without a bill of exceptions.[7]

Sec. 681. Prejudicial error.—As stated in the last section, error is presumed when there has been misdirection,[8] and so where all the facts do not appear upon the record, and the record and the reviewing court has not all the evidence before it but only what it tends to prove, it will be presumed that an erroneous instruction was prejudicial to the losing party.[9] The presumption of error arising from an erroneous charge is a rebuttable one upon argument and demonstration, and the judgment will not be reversed unless it appears that the party was prejudiced thereby.[10] An instruction which leaves the jury to draw an incorrect inference from facts material to the issue,[11]

[1] See Kinkead's Code Pleading, sec. 1240.

[2] Meek *v.* Penn. Co., 38 O. S. 632; P. C. & St. L. Ry. *v.* Hart, 10 O. C. C. 411; Lowe *v.* Lehman, 15 O. S. 179.

[3] Jones *v.* Bangs, 40 O. S. 139.

[4] Globe Insurance Co. *v.* Sherlock, 25 O. S. 50.

[5] P. C. & St. L. Ry. Co. *v.* Hart, 10 O. C. C. 411.

[6] Hills *v.* Ludwig, 46 O. S. 373.

[7] Fleischman *v.* Shoemaker, 2 O. C. C. 152.

[8] Jones *v.* Bangs, 40 O. S. 139; P. C. & St. L. Ry. *v.* Hart, 10 O. C. C. 411.

[9] Meek *v.* Penn. Co., 38 O. S. 632.

[10] Street Ry. Co. *v.* Stallman, 22 O. S. 1; P. C. & St. L. Ry. Co. *v.* Hart, 10 O. C. C. 411.

[11] Railway Co. *v.* Wettmore, 19 O. S. 111.

or a misdirection as to the burden of proof,[1] is reversible error. So where the verdict is the result of an erroneous instruction.[2]

Sec. 682. Non-prejudicial error in instructions.—There is no error where the charge is unexceptionable and the only complaint is that the court failed to give other instructions which were not requested.[3] If it appears from the record that the court refused to give "in the language and form" requested a correct proposition of law, it will be presumed in the absence of anything in the record to the contrary, that the same charge was substantially given.[4] Erroneous instructions must be prejudicial before a judgment can be reversed.[5] It will not be reversed where the evidence shows no right of recovery,[6] nor where there is no evidence showing the materiality of an erroneous charge.[7] It is not necessary to show that the jury were influenced by an erroneous charge to warrant a reversal.[8]

[1] McNutt *v.* Kaufman, 26 O. S. 127.
[2] Baker *v.* Pendergast, 32 O. S. 494.
[3] Smith *v.* R. R. Co., 23 O. S. 10.
[4] Bolen *v.* State, 26 O. S. 371.
[5] Lowe *v.* Lehman, 15 O. S. 179; Berry *v.* State, 31 O. 219.
[6] Elster *v.* Springfield, 49 O. S. 82; Bank *v.* Lane, 8 O. S. 405.
[7] Loudenback *v.* Collins, 4 O. S. 251.
[8] Lowe *v.* Lehman, 15 O. S. 179.

CHAPTER XXXII.

VERDICT OF JURY—ITS DELIVERY—FORM—VALIDITY AND OTHER INCIDENTS.

SEC.
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SEC. 683. Jury may decide in court or retire.—When the case is submitted, the jury may decide in court, or retire for deliberation.[1] They will hardly decide in court unless directed to by the court.

SEC. 684. Verdict delivered in open court.—The code provides in civil cases that when the jurors have agreed upon and prepared their verdict they must be conducted into court, their names called by the clerk, and the verdict rendered by the foreman ; and the clerk must read the verdict to the jury, and make inquiry whether it is their verdict.[2]

[1] Code, sec. 5192.

[2] O. Code, sec. 5197.

In both civil and criminal cases the court may permit the jury to seal their verdict and deliver it to the court.[1] The verdict should be delivered in open court, though it was held very early in this State that a verdict delivered to a judge at chambers is good;[2] but the authority for this view cannot be considered sound, the consensus of judicial opinion being that the verdict can only be received in open court.[3] In criminal procedure there is not much doubt but that the verdict must be delivered in open court.[4] The statute really requires it.[5]

The civil statute evidently requires it.[6] The verdict need not be received in the same room where trial is had.[7] Nor is it necessary for the same judge who presided during the trial to receive it.[8]

Sec. 685. Sealed verdict.—A sealed verdict is one which the jury have arrived at and signed in proper form, which is sealed up. In practice it is often found necessary to the comfort of jurors, as well as convenient to the public, to commit, in matters of form, much to the sound discretion of the court. Hence the court may, in civil and criminal cases, direct the jury to seal up their verdict and deliver it to the clerk and separate and bring it in in open court should they agree when the court is not in session.[9] They must all be present when the verdict is actually delivered to the court, so that the parties may have the privilege of polling the jury.[10] When they have returned they cannot deliberate further, hence upon being polled, if there be one who dissents, that vitiates the verdict.[11] The power to correct, alter or amend exists,[12] but that is not further deliberation. In some jurisdictions the right to have sealed verdicts depends upon the consent of the parties.[13] Opening a sealed verdict by counsel for the parties from curiosity to ascertain its contents, though an irregularity, is not sufficient to set the verdict aside.[14]

Sec. 686. Delivery on Sunday.—The earlier common law authorized courts to sit on Sunday and conduct the same busi-

[1] See sec. 685, *post*.

[2] Palmer *v.* Harper, W. 383. It must be in open court. Cratty *v.* Wyatt, 3 Bradw. 388.

[3] Bishop's New Cr. Pr., sec. 1001.

[4] Chicago *v.* Rogers, 61 Ill. 188; Rosser *v.* McColley, 9 Ind. 587; Commonwealth *v.* Tobin, 123 Mass. 203.

[5] R. S., sec. 7314.

[6] R. S., sec. 5197.

[7] Christie *v.* Browne, 27 N. Y. Supp. 657.

[8] State, *v.* Allen, 69 Miss. 508.

[9] Sudiff *v.* Gilbert, 8 O. 405; Sargent *v.* State 11 O. 472; State *v.* Engles, 13 O. 490; Bainbridge *v.* State, 30 O. S. 264.

[10] Bishop *v.* Mugler, 33 Kan. 145; Bishop's New Cr. Pr., sec. 1003; Fox *v.* Smith, 3 Cow. 23; Tornburgh *v.* Cole, 27 Kan. 490.

[11] State *v.* Engle, 13 O. 490, 493; *cf.* Maduska *v.* Thomas, 6 Kan. 153.

[12] See sec. 708, *post*.

[13] Fitnam's Trial Pr., sec. 638; Elliott's Gr. Pr., sec. 943.

[14] Smoots *v.* Foster, 16 O. C. C. 612; s. c. 9 O. C. Dec. 218.

ness on that day as upon other days.[1] Later the rule was changed so that it was considered that acts on that day were considered void.[2] It has not been expressly decided in Ohio that a verdict may be received on Sunday, though it has been actually done in practice.[3] The opinion in other jurisdictions upon this question is divided, some courts sustaining verdicts received on Sunday,[4] others holding the verdict void.[5]

Sec. 687. Must be returned by full number of jurors.—A verdict must be returned by a full number of jurors, and if by a less number than the full panel it is illegal. A direction to the jury to seal up their verdict and separate, does not dispense with their personal attendance in court when the verdict is opened.[6]

Sec. 688. Delivery in criminal cases in presence of accused and his counsel.—The right of the accused in criminal cases to be present at every stage of the trial is well understood. This right necessarily extends to the time when the verdict is returned.[7] He should have this right so as to be present and exercise the privilege of polling the jury.[8] But where the prisoner is not under imprisonment, but is at perfect liberty to go and to come as he pleases, as where he is out on bail, where he is properly notified but is not present, he cannot complain. Consequently it has been considered not error to receive a verdict under such circumstances in the voluntary absence of the defandant.[9] Where, however, he is imprisoned, then it is the duty of the court to see that he is present, and if he is prevented from being in the court when the verdict is received, by reason of his imprisonment, it is error entitling him to a new trial.[10]

The right of the prisoner's counsel to be present is another question. It has been held not to be error to omit to give counsel notice;[11] this is certainly doubtful, as counsel are surely

[1] Swann *v.* Broome, 3 Burrow, 1595.

[2] Hastings *v.* Columbus, 42 O. S. 588, 589.

[3] State *v.* Engle, 13 O. 490, 493. In Morehead *v.* State, (reported on other grounds in 34 O. S. 212) the verdict was received on Sunday, and the Supreme Court unanimously held that there was no error in so receiving it. 42 O. S. 589.

[4] Cory *v.* Silcox, 5 Ind. 370; Reid *v.* State, 53 Ala. 402; s. c., 25 Am. Rep. 627; Weber *v.* State, 34 N. H. 202; True *v.* Plumley, 36 Me. 466; Hoghtoling *v.* Osborne, 15 Johns. 119.

[5] Bass *v.* Irvin, 49 Ga. 436; Davis *v.* Fish. 1 G. Greene, 407.

[6] Cratty *v.* Wyatt, 3 Bradw. 388; Bishop *v.* Mugler, 33 Kan. 145; State *v.* Engles, 13 Oh. 490, 492, 493.

[7] Rose *v.* State, 20 O. 32; Bennett *v.* State, 10 O. C. C. 84; Weaver *v.* State, 24 O. S. 584.

[8] Sargent *v.* State, 11 O. 472.

[9] Wilson *v.* State, 2 O. S. 319; Fight *v.* State, 7 O. (pt. 1) 181.

[10] Rose *v.* State, 20 O. 32.

[11] Sutcliffe *v.* State, 18 O. 469.

entitled to a reasonable opportunity to be present when the verdict is delivered. Where, however, counsel are notified in the accustomed way, as by the old custom of calling aloud at the court house door, or ringing the court house bell, the court, after waiting a reasonable time, receives the verdict in the absence of counsel, there is no error.[1]

Sec. 689. Delivery in presence of parties and counsel in civil cases.—There are substantially the same reasons why parties and their counsel should be present at the reception of the verdict, and should have an opportunity, in civil cases as in criminal cases, aside from the question of imprisonment of the accused. The right to poll the jury is an important right, and exists in civil procedure. Reasonable opportunity must, therefore, be given counsel to be present when the verdict is received.[2] Counsel have the right to have a reasonable opportunity to be present when the verdict is received. If afforded that privilege, and they are not present, the verdict may be received.[3]

Sec. 690. Polling the jury.—In civil and criminal cases the right to poll the jury is secured in unequivocal terms. It may be at the request of either the State or the defendant.[4] This is done by the clerk asking each juror if it is his verdict. In civil cases the statute permits the court to send the jury out for further deliberation when a juror answers in the negative when the jury is being polled. Or the jury may be discharged.[5]

Sec. 691. When jury may be sent out for further deliberation.—If a juror disagree, or if, when the jury is being polled, a juror answer in the negative, or if the verdict is defective in matter of substance, the jury must be sent out again for further deliberation.[6]

Sec. 692. Verdict when either party entitled to recover money.—When, by the verdict, either party is entitled to recover money of the adverse party, the jury, in its verdict, must assess the amount of recovery.[7] In an action for the recovery of money, if the verdict finds for the plaintiff, but its language is such that, when read in connection with the record, the amount assessed for the plaintiff cannot be ascertained without reference

[1] Weaver *v.* State, 24 O. S. 584; Crusen *v.* State, 10 O. S. 258.

[2] Kullberg *v.* O'Donnell, 158 Mass. 405; 35 Am. St. 507; Reilly *v.* Bader, 46 Minn. 212; Perry *v.* Mulligan, 58 Ga. 479.

[3] Weaver *v.* State, 24 O. S. 584; Sutcliffe *v.* State, 18 O. 469; Crusen *v.* State, 10 O. S. 258.

[4] R. S., secs. 5198, 7314.

[5] R. S., sec. 5198; Scott *v.* Scott, 110 Pa. St. 387.

[6] R. S., sec. 5198.

[7] Code, sec. 5203.

to the evidence offered on the trial, no judgment can properly be entered on such uncertain verdict.[1]

Sec. 693. Verdict must be reduced to writing.—In civil procedure the verdict must be reduced to writing.[2] There is no such provision in the criminal code, and it has been held that if a verdict be delivered orally in a criminal cause and the jury is polled and each answers that it is his verdict, and it is entered on the record, it is nevertheless a good verdict. The fact that it is not in writing and signed by the foreman is not an irregularity as affects substantial rights.[3]

Sec. 694. Verdict must be signed.—When the verdict is reduced to writing, it must be signed by the foreman.[4] The foreman may sign the verdict in the presence of the others, after it has been returned to the court.[5]

Sec. 695. Verdict when higher and lesser crime charged.—The accused in a criminal case may be found guilty of the principal offense charged in the indictment, or acquitted thereof and found guilty of any offense in terms or by necessary implication charged in the indictment,[6] or the verdict may be not guilty of the offense charged but guilty of an attempt to commit the same, if the attempt is an offense. And when the indictment charges an offense including different degrees, the jury may return a verdict of not guilty of the degree charged, but guilty of any inferior degree.[7] For instance, a few illustrations are given. Under an indictment for assault with intent to kill, the verdict may be for assault and battery, or assault alone,[8] or under an indictment for murder in the first degree the verdict may be for the second degree, manslaughter or assault and battery.[9] A verdict of guilty of murder in the second degree is good without expressly acquitting the defendant of murder in the first degree.[10] Under an indictment for maliciously cutting with intent to kill, the prisoner cannot be convicted of maliciously cutting with intent to wound.[11] A person charged with shooting with intent to kill may be convicted of assault and battery,[12] or one charged with robbery and assault with intent to commit robbery, may be found guilty of the lesser offense.[13]

[1] Fries *v.* Mack, 33 O. S. 52.
[2] R. S., sec. 5197.
[3] Hardy *v.* State, 19 O. S. 579. See Bishop's Cr. Pr., sec. 1002.
[4] R. S., sec. 5197 in civil cases.
[5] Clough *v.* State, 7 Neb. 320.
[6] Mitchell *v.* State, 42 O. S. 383.
[7] R. S., sec. 7316.
[8] Stewart *v.* State, 5 O. 241.
[9] Wroe *v.* State, 20 O. S. 460; Mart *v.* State, 26 O. S. 162.
[10] Morehead *v.* State, 34 O. S. 212.
[11] Barber *v.* State, 39 O. S. 665.
[12] Heller *v.* State, 23 O. S. 582.
[13] Howard *v.* State, 25 O. S. 399.

Sec. 696. Form of verdict in homicide.—On the trial of an indictment, charging the crime of murder in the first degree, in the descriptive words of the statute, a verdict of "guilty in manner and form as charged in said indictment," is sufficient.[1]

In all trials for murder, the degree of the crime must be found as a matter of fact, and be specified in the verdict of the jury; and without an express finding, ascertaining the degree of the crime, the court is not authorized to inflict the punishment prescribed by law for either degree of the crime.[2]

Sec. 697. Effect of nolle as to one degree.—Where, upon the trial of an indictment for an assault with intent to murder, the prosecuting attorney, by leave of the court, and without the consent of the defendant, enters a *nolle prosequi*, so far as relates to the intent to murder, such entry of the *nolle* is equivalent to an abandonment of that part of the indictment which is no further prosecuted, and operates, so far, as an acquittal of the defendant; but he may still, by the verdict of the jury, be convicted of the minor offense of an assault; in respect to which a *nolle prosequi* has not been entered.[3]

Sec. 698. Forms of verdict in crimes lower than homicide.—On a general verdict of guilty upon a count in an indictment which charges a burglarious breaking and entry of a store with intent to steal, and an actual larceny of the goods therein, the accused may be sentenced for the burglary, but not the larceny; and where the jury return a verdict of "guilty of the burglary as charged," the court may sentence the accused for that crime, although the verdict does not respond to the charge of larceny made in the same count.[4] And upon the trial of an indictment for carrying a concealed weapon, the jury may acquit the accused if it appears that he was engaged in any lawful business, calling, or employment, such as would justify a prudent person in carrying the weapon for the defense of his person, property or family.[5]

On a trial of an indictment for embezzlement of money, the verdict should show the amount found to have been embezzled.[6]

Sec. 699. When more than one cause of action in petition.—Where there are two or more causes of action alleged in the petition, the verdict should be responsive to each in order that the court may know how the issues were found. A general ver-

[1] Dick *v.* State, 3 O. S. 89.

[2] Dick *v.* State, 3 O. S. 89; Parkes *v.* State, 3 O. S. 101.

[3] Baker *v.* State, 12 O. S. 214.

[4] Breese *v.* State, 12 O. S. 146.

[5] R. S., sec. 7317; 3 O. C. C. 660.

[6] Brown *v.* State, 18 O. S. 496; Myers *v.* State, 4 O. C. C. 570.

dict from its very nature is not sufficient in such case.[1] A general verdict is that by which the jury finds generally upon all or any of the issues.[2] The jury may be sent out to make a finding upon each.[3]

Sec. 700. When on several counts in criminal cases.—The general rule prevailing in criminal procedure is that where distinct offenses are charged in separate counts of an indictment, the jury must either return a general verdict of not guilty or respond to each charge in their findings.[4] The intention of the jury to convict the defendant of all that he is charged with, may be gathered from any form, however inadequate, which clearly discloses that intention.[5] Mr. Bishop says: "The full and orderly phrase is 'guilty in manner and form as charged against him in the indictment.'"[6] While the court may, it is not bound to receive a verdict which finds the defendant guilty on one count, without finding as to the other counts, and as a general rule where such a verdict is tendered, the court should require the jury to deliberate further, so as to be able to respond to each count.[7] The defendant cannot complain unless he has requested the court to order separate verdicts.[8] The court may refuse to receive a verdict which finds the defendant not guilty on the first count, but do not agree upon the others.[9] If there are several counts, only one of which is good, the good count will support a general verdict of guilty.[10] Where a single offense is charged by an indictment sustaining four counts, each charging the embezzlement of $3,000, a general finding of the jury that the defendant was guilty and fixing the amount at $5,000, cannot be upheld.[11] Where an indictment contained seven counts and the verdict is, not guilty upon the sixth and seventh counts, but guilty on the first, second, third, fourth and fifth counts, the verdict is equivalent to a general verdict of guilty on the first five counts.[12]

[1] Brownell *v.* R. R. Co., 47 Mo. 239; Bigelow *v.* R. R. Co. 48 Mo. 510; Mooney *v.* Kennett, 19 Mo. 551; Bricker *v.* Ry. Co., 83 Mo. 391; Pitts *v.* Fugate, 41 Mo. 405. Compare Rowley *v.* Ray, 139 Mass. 241.

[2] See sec. 701, *post.*

[3] Hadley *v.* Heywood, 121 Mass. 236.

[4] Wilson *v.* State, 20 O. 26; Hadley *v.* Heywood, 121 Mass. 236; Casey *v.* State, 20 Neb. 138.

[5] Bishop's New Cr. Pr., sec. 1005*a*, (2) and cases.

[6] Bishop, sec. 1005*a*.

A general verdict that the defendant "is guilty in manner and form as he stands charged in the indictment," where the indictment contains two counts charging distinct misdemeanors, will authorize a sentence upon each count. Eldredge *v.* State, 37 O. S. 191

[7] Jackson *v.* State, 39 O. S. 37; Hurley *v.* State, 4 O. C. C. 425.

[8] State *v.* Basserman, 54 Conn. 88.

[9] Hurley *v.* State, 6 O. 399.

[10] Stoughton *v.* State, 2 O. S. 563; Brown *v.* State, 18 O. S. 496; Buck *v.* State, 1 O. S. 61.

[11] Myers *v.* State, 4 O. C. C. 570.

[12] Bailey *v.* State, 4 O. S. 440.

Sec. 701. General verdict.—The verdict of a jury must be either general or special; a general verdict is that by which the jury finds, generally, upon all or any of the issues, in favor of either the plaintiff or defendant.[1]

A finding for the plaintiff or defendant carries with it the presumption that it is a finding upon the issues joined between the parties.[2]

The jury are authorized in its discretion, unless otherwise directed by the court, to render either a general or a special verdict. If either party request it, the court must direct them to give a special verdict. So also, when requested by either party, the court must instruct the jurors, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing.[3] Thus we may have a general verdict and a special finding upon special interrogatories at the same time, and in order that both may stand they must be consistent with each other. When the special finding is inconsistent with the general verdict, the former controls and the court may give judgment accordingly upon the special finding.[4] Judgment cannot be rendered on the general verdict in such case.[5] The general verdict must prevail, however, if reconcilable with the answers to the special interrogatories upon any state of facts probable under the issues in the case.[6] And when the special finding is not inconsistent with the general verdict, judgment will follow the latter.[7]

Sec. 702. The special verdict.—A special verdict is that by which the jury finds the facts only, and it must present the facts established by the evidence, and not the evidence to prove the facts.[8] In all actions, unless otherwise directed by the court, the jury may, in its discretion, render a general or a special verdict. The court must, upon the request of either party, direct them to give a special verdict in writing upon all or any of the issues.[9] The right of the court to direct the jury to find a special verdict is purely discretionary, and their refusal to do so cannot be assigned as error.[10]

[1] R. S., sec. 5200.

[2] Fries *v.* Mack, 33 O. S. 52; Sutcliffe *v.* Gilbert, 8 O. 405.

[3] R. S., 5201.

[4] R. S., sec. 5202; Harsh *v.* Klepper, 28 O. S. 200; Schaeffler *v.* Sandusky, 33 O. S. 246; Middleport *v.* Taylor, 2 O. C. C. 366; Ogg *v.* Shehan, 17 Neb. 323.

[5] Cook *v.* Howe, 77 Ind. 442.

[6] Toledo Elec. St. Ry. Co. *v.* Bateman, 16 O. C. C. 163.

[7] Clark *v.* Bradshaw, 2 O. C. C. 56.

[8] R. S., sec. 5200. Facts, and not evidence must be found. Leach *v.* Church, 10 O. S. 148; Fries *v.* Mack, 33 O. S. 52.

[9] R. S., sec. 5201.

[10] The C. C. & C. R. R. Co. *v.* Terry, 8 O. S. 570; Adams Express Co. *v.* Pollock, 12 O. S. 618.

The object of a special verdict is "to exhibit the facts of the case in such a manner that the court can decide according to law, and relieve the jury from the necessity of deciding legal questions on which they may have doubts."[1]

Sec. 703. Requisites of special verdict.—In rendering a special verdict the jury consider only the facts, leaving the law wholly and exclusively to the court.[2] Facts admitted by the pleadings need not be found.[3] It is only the issuable facts presented by the pleadings.[4] A special verdict should find facts to which the law gives a determinate effect, conclusive of the issue.[5] It is irregular and insufficient unless it find the truth of the facts. It will not do to refer the evidence to the court and ask their judgment upon it.[6] The facts must be such as to warrant the court in pronouncing judgment, and not such as merely tend to show the ultimate facts.[7] To authorize a judgment upon a special verdict, all the facts essential to the right of the party in whose favor judgment is to be rendered must be found.[8] A special verdict that follows the averments of a pleading in which the facts found are well pleaded, is not, therefore, faulty. The absence of an affirmative finding in a special verdict as to any issue, amounts to a finding thereon against the party upon whom rests the burden of proof as to such issue.[9]

Sec. 704. Special finding by jury—Interrogatories.—In all cases, when requested by either party, the court shall instruct the jurors, if they render a general verdict, to find specially upon particular questions of fact, to be stated in writing, and shall direct a written finding thereon, and the verdict and finding must be filed with the clerk and entered on the journal.[10] The distinction between a special verdict and special finding is this: A special finding is a single inquiry into a particular fact essential to the finding of a general verdict, while a special verdict is a complete finding embracing all the proved or admitted facts.[11] A more careful and methodical consideration of the tes-

[1] Goldsly *v.* Robertson, 1 Blackf. (Ind.) 247. To justify the court in rendering judgment for the plaintiff on a special verdict, the verdict must exhibit all the facts which it was necessary for the plaintiff to prove in order to recover. *Id.* See 98 Ind. 186; 8 Kan. 660; 106 Ind. 305; 60 Tex. 462.

[2] P. C. & St. L. R. Co. *v.* Spencer, 98 Ind. 186.

[3] Burton *v.* Boyd, 7 Kan. 17.

[4] Bank *v.* Peck, 8 Kan. 660.

[5] Leach *v.* Church, 10 O. S. 148; Gould's Plg., ch. 10, sec. 462.

[6] Hambleton *v.* Dempsey, 20 O. 168.

[7] *Id.;* Blake *v.* Davis, 20 O. 231; Indianapolis, &c., R. R. Co. *v.* Bush, 101 Ind. 582; Sisson *v.* Barrett, 2 N. Y. 406.

[8] Blake *v.* Davis, 20 O. 231; Rice *v.* Evansville, 108 Ind. 7; Thompson on Trials, sec. 2651; Gonigle *v.* Gordon, 11 Kan. 167.

[9] Hayes *v.* Smith, 15 O. C. C. 301.

[10] Whittaker's Civ. Code, sec. 5201.

[11] Morse *v.* Morse, 25 Ind. 156.

timony by the jury is thus secured.[1] The court is thus enabled to apply the law correctly, to guard against misapplication of the law by the jury,[2] and also to control their general verdict by findings which would render a second trial unnecessary when no exceptions were taken to a charge.[3] If the jury returns answers without a general verdict, they are regarded as a nullity[4] unless they are so numerous and explicit as to cover the whole controversy and constitute a special verdict.[5]

The "particular questions of fact" contemplated by the statute are such that the answers to them will establish ultimate and determinate facts, and not those which are only of a probative character; such facts as will enable the court in the application of the law, to determine the rights of the parties, and not those which simply tend to prove them. In arriving at their verdict the jury presumably agree upon the ultimate facts on which it is founded; and these the jury may be required to find specially in answer to pertinent interrogations, in order that the court may determine whether they are sufficient to sustain the verdict. Anything beyond this is practically but a means of enforcing a disclosure of the process by which the jury arrive at their conclusions upon the ultimate facts, and is not within the purpose of the statutes.[6] The return of a negative and affirmative answer to a question submitted is in effect a failure to answer. In such case, however, if there be sufficient in other findings to determine all material questions in the case and to show clearly what the jury intends, the court is warranted in accepting the verdict.[7] An answer by a jury as to whether a particular fact exists, "probably not," is a finding that it does not exist.[8] The jury should not be confused by a great number of questions, but rather they should be limited.[9] Where a party after the close of the argument, and before the charge of the jury, asks for a special verdict upon all the issues of the case, by having several questions answered, which are proper to be submitted to the jury and are pertinent to the issues made by the pleadings and by the evidence, it is error for the court to refuse on the sole ground that the request comes too late. The statute does not fix any time, or stage of the trial, when the special interrogatories shall be submitted, and the court cannot add anything to the statute.[10] It is the duty of the jury

[1] Davis *v.* Town, 42 Wis. 425.

[2] Morrow *v.* Commissioners, 21 Kan. 484.

[3] Moss *v.* Priest, 19 Abb. Pr. 314.

[4] Pea *v.* Pea, 35 Ind. 387.

[5] Woolen *v.* Whitacre, 91 Ind. 502; Johnson *v.* Lumber Co., 47 Wis. 326.

[6] Schweinfurth *v.* Railway Co., 60 O. S. 215.

[7] Gottschalk *v.* Witter, 25 O. S. 76.

[8] Davis *v.* Guarnieri, 45 O. S. 470.

[9] City *v.* Lawyer, 38 Ind. 348; Ward *v.* Busack, 46 Wis. 407.

[10] Railroad Co. *v.* McCarney, 12 O. C. C. 543.

to fairly and honestly answer any interrogatory submitted to them, especially so, when there is no conflict in the evidence upon the fact submitted in the interrogatory.[1] But if there is no testimony before them to warrant any finding upon the questions submitted by the special interrogatories, they need not answer them, and a party has no right to insist upon an answer.[2]

Where questions for special findings are submitted to the jury who answer as to part, but disagree as to others, counsel consenting to the discharge of a jury under such circumstances, such consent is a waiver of all objections to the verdict and judgment.[3]

Sec. 705. What questions may be asked.—Necessarily only such questions may be submitted as are presented by the pleadings,[4] and supported by the evidence even though raised by the pleadings.[5] They must not be irrelevant, immaterial or frivolous questions.[6] They should be material, controverted facts.[7] Each question should embrace but one point.[8] If not sufficiently broad or specific, the opposite party may present questions designed to bring out the points desired to be made.[9] The court may decide on the form of the question.[10]

The questions submitted must not assume the existence of certain facts and ask whether they do not constitute a ground for action.[11]

Sec. 706. Objections to special findings.—As a rule the jury is bound to answer all such interrogatories as the evidence enables them to do,[12] though if they fail to find a fact which may be inferred from other facts found, it will be immaterial.[13] If parties desire more specific answers the jury may upon motion be sent back to amend their answers.[14] But if they fail to agree upon any question, they may be discharged.[15] If there be any objections to the findings as made, the remedy is by motion for new trial.[16]

[1] B. & O. R. R. Co. *v.* McPeek, 16 O. C. C 87.

[2] Miller *v.* Southworth, 10 O. C. C. 572.

[3] Miller *v.* Southworth, 10 O. C. C. 572.

[4] Wyckoff *v.* Taylor, 13 Daly, 564; 51 Wis. 72; 47 Mich. 82.

[5] Cay *v.* Noll, 20 Neb. 380; The L. & W. Ry. *v.* Anderson, 41 Kan. 528.

[6] Bent *v.* Philbrick, 16 Kan. 190.

[7] Campbell *v* Frankem, 65 Ind. 591; Miner *v.* Vedder, 33 N. W. 47; 66 Mich. 101.

[8] Jewell *v.* R. R. Co., 54 Wis. 610.

[9] Bradley *v.* Bradley, 45 Ind. 67.

[10] Ward *v.* Busack, 46 Wis. 407.

[11] P. C. & St. L. R. Co. *v.* Spencer, 98 Ind. 186.

[12] Summers *v.* Greathouse, 87 Ind. 205.

[13] Jones *v.* Foster, 67 Wis. 296.

[14] Rush *v.* Pedigo, 63 Ind. 479; Long *v.* Duncan, 10 Kan. 294. See 14 Kan. 37, 48 Wis. 413.

[15] Kan. P. Ry. Co. *v.* Reynolds, 8 Kan. 628.

[16] Louisville, &c., R. R. Co. *v.* Thompson, 107 Ind. 442.

Sec. 707. Dual verdict.—A verdict for both the plaintiff and the defendant is not inconsistent, if dual in form, and the separate findings are on the causes of action severally pleaded by them respectively.[1]

Sec. 708. Verdict may be amended, when.—The civil code in substance permits a verdict to be amended in two instances. If it be defective in form only, it may, with the assent of the jurors before they are discharged, be corrected by the court.[2] Under the practice before the adoption of this provision the court could properly conform the verdict to the clear intention of the jury.[3] If it be defective in the matter of substance, the jury must be sent out again for further deliberation.[4] The criminal code is silent as to this point, but the rule prevails in criminal procedure, that after the jury have been discharged and separated, they cannot be recalled to amend their verdict.[5] And so in criminal procedure before the verdict is actually entered of record, it may be amended or changed in certain cases at the pleasure of the jury or by direction of the court.[6] Where the court has merely announced that the jury are discharged but they have not actually dispersed, they may still be sent out for the purpose of amending their verdict.[7] Many cases may arise where it is manifest that a verdict is erroneous, as where it appears that the jury misunderstood the legal term used in their verdict, or other reasons, and there is just cause for amending the verdict, but the weight of authority is that after the jury have been discharged the court has no power to amend it. The only recourse in such case is to have it set aside.[8] If the verdict in a civil case upon a promissory note fails to include the interest, which they must do by computation, or have not specified the amount due, it may be amended at the proper time by adding the same.[9] And where two forms are sent to the jury and the foreman signs the wrong one, it may be changed in open court with the assent of the jurors,[10] or if the jury make a mistake in the calculation of

[1] Hauss *v.* Koehler, 17 O. C. C. 536; s. c. 9 O. C. Dec. 684.

[2] R. S., sec. 5199.

[3] 3 O. 384; 2 O. 31; W. 645.

[4] R. S., sec. 5198.

[5] Sargent *v.* State, 11 O. 472; Helmerking *v.* State, 10 W. L. J. 66; Abbott's Cr. Briefs, p. 512.

[6] Bishop's Cr. Pr., sec. 1003; Abbott's Cr. Briefs, p. 512. As where it is not responsive, unintelligible, or finds the defendant guilty of a crime of which he could not be convicted. *Id.* Irresponsive matter may be stricken out. Commonwealth *v.* Lang, 10 Gray, 11.

[7] Sargent *v.* State, 11 O. 472; Patrick Red Sandstone Co. *v.* Skoman, 1 Col. App. 323.

[8] Wertz *v.* R. R. Co., 1 Toledo Legal News, 484; Waters *v.* Jenkins, 16 S. & R. 416; 16 Am. Dec. 585; 4 Gilman, 326; Seith *v.* Alison, 52 Am. Dec. 246; Riggs *v.* Cook, 46 Am. Dec. 462; Sargent *v.* State, 11 O. 472; Little *v.* Larrabee, 2 Greenl. 37; 11 Am. Dec. 43.

[9] Peetsch *v.* Quinn, 27 N. Y. Supp. 323; Sutliff *v.* Gilbert, 8 O. 409.

[10] Twomey *v.* Linnehan, 36 N. E. 590; 161 Mass. 91.

the amount found due in a case,[1] or if it is in excess of the amount claimed[2] the jury may be sent back to amend it.

Sec. 709. Verdict cures what.— It has been said that there is no principle in law more fully established by the best authorities than that all errors are cured by verdict, that might have been taken advantage of by demurrer, abatement or any other special plea.[3] This statement is not entirely accurate, especially as to defects that might have been taken advantage of by demurrer. It is principally formal defects that the verdict cures. Such defects as arise from the manner of statement of the plaintiff's cause of action so long as the facts proved show a cause of action, no matter how inartificially or defectively stated it may be, are cured by verdict.[4] If there be no cause of action stated, if the title upon which recovery is based is defective, such defect cannot be cured.[5] Error in sustaining a demurrer to a good reply, to which ruling an exception is duly taken, is not cured by a special finding.[6]

Sec. 710. Manner of arriving at verdict.—The jury in making up their verdict must be guided solely by the evidence and the instructions of the court. They may use the knowledge which they possess in common with mankind, but not any special knowledge they may have of the particular case on trial, and the court should so instruct them.[7] In fact when the jury is being impaneled, a juror is in duty bound to disclose any personal knowledge he may have of the case.

An averaged verdict is where the jury enters into an agreement that each one shall name a sum and then strike an average by adding the amounts together and dividing them by twelve. Such a verdict is illegal where the agreement made before voting is that they will stand by it;[8] but it is not invalid where the jury do not agree before the voting to be bound by it, but

[1] Sanders *v.* Bagwell, 15 S. E. 714; 37 S. C. 145; Johnson *v.* Rider, 50 N. W. 36; 84 Ia. 50.

[2] Patrick Red Sandstone Co. *v.* Skoman, 1 Col. App. 323.

[3] 2 Bac. Ab. 492; 1 Saund. 227, 228, note 1; 1 Arch. Pl. 178; 1 Pet. Cond. 326, notes.

[4] Erwin *v.* Shaffer, 9 O. S. 43; Nott *v.* Johnson, 7 O. S. 270; Maxfield *v.* Johnston, 2 O. 204; City *v.* Moore, 30 O. S. 133; Trimble *v.* Doty, 16 O. S. 118; Bethel *v.* Woodworth, 11 O. S. 393; C. & P. R. Co. *v.* Stackhouse, 10 O. S. 567.

[5] Maxfield *v.* Johnston, *supra;* C. & P. R. Co. *v.* Stackhouse, 10 O. S. 567; "The general rule, is, that while a defective title is never cured by verdict, a good title defectively stated, may be. Nott *v.* Johnson, 7 O. S. 270.

[6] New *v.* Walker, 108 Ind. 365

[7] Waite *v.* Teeters, 36 Kan. 608.

[8] Binke *v.* Magee, 42 N. W. 890; 27 Neb. 156; Schoolfield *v.* Brunton, 36 Pac. 1103; 20 Col. 139; Johnson *v.* Husband, 22 Kan. 277; C. & I. Coal Ry. *v.* McDaniel, 134 Ind. 166; Pawnee Ditch & Co. *v.* Adams, 1 Col. App. 250; 28 Pac. 662; Dooley *v.* State, 128 Ind. 239; State *v.* Bransetter, 65 Mo. 149; Werner *v.* Ednuston, 24 Kan. 147.

merely accepted the average after discussion as to the reasonable and fair result.[1] It is proper to instruct the jury that it is illegal and improper for them to arrive at a verdict in this manner.[2] A verdict secured by an agreement to submit to a majority is void;[3] it must be a unanimous verdict by a common-law jury.

Sec. 711. Excessive verdict.—Remittitur.—Whether or not a verdict is excessive in some instances presents nice and difficult questions. In some cases excessiveness may be plainly apparent. For example where the verdict is for a greater amount than is claimed,[4] or where it exceeds the market value of property, the subject of the action.[5] The first step to be taken by way of objecting to a verdict on the ground that it is excessive, is by a motion to set it aside for that reason. The motion must state in the language of the statute that "the verdict is excessive, appearing to have been given under the influence of passion or prejudice."[6] It is the duty of the trial court to set it aside when found by it to be excessive. If the motion is overruled, error may be prosecuted. In some cases courts may be guided by standards of compensation, in others there may be no guide. The general rule in cases where there is no standard of compensation, is that the court will not disturb the verdict, unless it is so disproportionate to the damages shown by the evidence as to convince the court that the jury in rendering the same were governed by prejudice, passion, or feeling, instead of by cool and calm judgment.[7] Excessive damages, appearing to have been given under the influence of passion or prejudice, is made a specific ground for a new trial by the code.[8] The necessity of setting aside an excessive verdict may be avoided by a remittitur either by the trial court upon motion for a new trial,[9] or by a reviewing court to prevent a reversal.[10] A reviewing court,

[1] Cortelyon *v.* McCarthy, 37 Neb. 742, Consolidated Ice Mach. Co. *v.* Ice Co., 57 Fed. 898; Orange Belt Ry. Co. *v.* Craver, 32 Fla. 28; Luft *v.* Lingane, 22 Atl. 942; 17 R. I. 420; Pruit *v.* State, 30 Tex. Civ. App. 156; 16 S. W. 773; Knight *v.* Fisher, 15 Col. 176.

[2] Sharp *v.* Kansas City Cable Co., 114 Mo. 94.

[3] Houk *v.* Allen, 126 Ind. 568.

[4] Powell *v.* Harter, 5 O. 259; Kinkead's Code Pldg., sec. 1255.

[5] Jacksonville T. & K. W. Ry. *v.* Garrison, 30 Fla. 431. (Suit for killing cow). See Berry *v.* Collins, 9 O. C. C. 656.

[6] Schlitz Brewing Co. *v.* Blacklay, 18 O. C. C. 359; Miller *v.* Gleason, 18 O. C. C. 374.

[7] Pendleton St. R. R. Co. *v.* Rahmann, 22 O. S. 446; Brooklyn St. R. R. Co. *v.* Kelley, 6 O. C. C. 155; Pratt *v.* Press Co., 30 Minn. 41; Brosde *v.* Sanderson, 86 Wis. 368. See Jaggard on Torts, p. 400; Toledo Con. St. R. Co. *v.* Rohner, 9 O. C. C. 702, 707; Kinkead's Code Plg., sec. 1255.

[8] Whittaker's Civ. Code, sec. 5305.

[9] C., C., C. & I. Ry. *v.* McLean, 1 O. C. C. 112; Clary *v.* Ins. Co., W. 227; Bagley *v.* Bates, W. 705; Doty *v.* Rigour, 9 O. S. 519; Douglas *v.* Day, 28 O. S. 175; Pendleton St. Ry. *v.* Rahmann, 22 O. S. 446; Simpson *v.* Pitman, 13 O. 365.

[10] Railroad *v.* Mowery, 36 O. S. 418; Collins *v.* John, W. 628; Lear *v.* McMillan, 17 O. S. 464; Averill Coal, &c.,

not having the benefit of the personal presence of witnesses and parties, will act with more hesitancy than trial courts.[1] A party who has consented to a remittitur to prevent a new trial, cannot upon error by cross-petition ask to have such remittitur set aside.[2]

In some cases the jury may award exemplary damages without proof of actual malice. In such cases the verdict will not be set aside because excessive, unless the court be satisfied that the jury abused their discretion.[3]

Sec. 712. Verdict must be confined to the issues.—Necessarily a verdict must be confined to the issues,[4] and must find substantially upon all the issues.[5] A finding thus: "Find the issues joined in the cause" in favor of one of the parties, is a finding of each and all of the issues for such party.[6] A verdict cannot be regarded as a finding of the value of services as upon a *quantum meruit*, where the case is not submitted for such a finding, but under instructions to assess damages according to the terms of a void agreement.[7] Where, in an action for the breach of a contract, the answer denies the contract, as stated in the petition, setting forth the contract sued upon in different terms, claiming damages for its breach, a verdict that the defendant is entitled to recover of the plaintiff a specified sum, is sufficiently responsive to the issues. It in effect finds that the contract was as set forth in the answer, and not as set forth in the petition.[8] Although the verdict is only required to respond to the issues in the case, yet if, taking the verdict in connection with the charge of the court, it is rendered uncertain whether the jury, in assessing damages on the counter-claim, did or did not deduct the amount of the plaintiff's demand, the verdict should be set aside and a new trial ordered.[9] Where the issue is joined in an action to recover damages for assault and battery, as to the guilt of the defendant, and whether or not the injury to the plaintiff was occasioned by his own fault in first assaulting the defendant, and the jury by their verdict "do find and say that the plaintiff is entitled to nine hundred and ninety dollars damages in the above case," such a verdict is substantially a finding of the issue in favor of the plaintiff.[10]

Co. *v.* Verner, 22 O. S. 372; Kershaw *v.* Snowden, 36 O. S. 181; Hanes *v.* Tiffany, 25 O. S. 548; Insurance Co. *v.* Pottker, 33 O. S. 459, and other Ohio cases.

[1] Brooklyn St. Ry. Co. *v.* Kelley, 6 O. C. C. 155.

[2] C., C., C. & I. Ry. Co. *v.* McLean, 1 O. C. C. 112.

[3] Schneider *v.* Hosier, 21 O. S. 98.

[4] Brainard *v.* Lane, 26 O. S. 632; Jenkins *v.* Richardson, 6 J. J. Marshall, 441; 22 Am. Dec. 82.

[5] 2 Thompson on Trials, sec. 2639; Elliott's Gen. Pr., sec. 942.

[6] Sites *v.* Haverstick, 23 O. S. 626.

[7] Howard *v.* Brower, 37 O. S. 403.

[8] Markward *v.* Doriat, 21 O. S. 637.

[9] Brainard *v.* Lane, 26 O. S. 632.

[10] Shaul *v.* Norman, 34 O. S. 157.

Sec. 713. Must not be against the evidence.—The verdict must not only be sustained by sufficient evidence,[1] but must be supported by the weight of the evidence. To raise these questions motions for a new trial must be made upon this ground. But in order to invoke the action of the reviewing court it must appear either expressly or by necessary implication that the bill of exceptions contains *all* the evidence given to the jury on the trial.[2] If the bill of exceptions does not purport to contain all the evidence the court will not presume error, but on the contrary will draw the inference that the evidence not set out was sufficient to sustain the verdict.[3]

The circuit court will consider the question whether or not the verdict is not sustained by the evidence or is against the weight of the evidence, while the supreme court is especially relieved from considering the weight of the evidence.[4] Whether or not there is *any* evidence to sustain the verdict will be considered.[5]

A judgment will not be reversed because the verdict is contrary to the evidence, unless it is manifestly so, and the reviewing court will always hesitate to do so where the doubts of its propriety arise out of a conflict of oral testimony.[6]

Sec. 714. Invalid because error in assessment of recovery.—A verdict may be set aside if there has been an error in the assessment of the amount of the recovery, whether too large or too small, when the action is upon contract, or for injury or detention of property.[7]

Sec. 715. Void for uncertainty.—A verdict to be valid must not only be responsive to the issues, but its meaning and intention must be clear and certain in all essential respects. If it is uncertain it is void and should be set aside.[8] A verdict "on all the issues joined" is good as covering all the issues.[9] If there be more than one defendant it must show clearly that the verdict is against both.[10] If the language is such that the effect and meaning cannot be ascertained without reference to the evidence

[1] Whittaker's Civ. Code, sec. 5305; Kinkead's Code Pldg., sec. 1257.

[2] Eastman *v.* Wight, 4 O. S. 156; Cantwell *v.* State, 18 O. S. 477.

[3] Wilson *v.* State, 2 O. S. 319.

[4] Kinkead's Code Pldg., sec. 1287; Code, sec. 6710.

[5] *Id.*

[6] Breese *v.* State, 12 O. S. 146.

[7] Whittaker's Civ. Code, sec. 5305. See 6 W. L. B. 755. See Kinkead's Code Pldg., sec. 1256.

[8] Kyser *v.* Cannon, 29 O. S. 359; State *v.* Coon, 18 Minn. 518.

[9] Sites *v.* Haverstick, 23 O. S. 626; Butler *v.* Kneeland, 23 O. S. 196; Insurance Co. *v.* Sutphin, 35 O. S. 360; Topliff *v.* Topliff, 8 O. C. C. 55.

[10] Richards *v.* Sperry, 7 Wis. 219; People *v.* Sepulneda, 59 Cal. 342; Favor *v.* State, 54 Ga. 249.

judgment cannot be entered upon it.[1] The rules as to certainty are applicable alike to criminal and civil procedure. A verdict in a criminal case must clearly designate the defendant as the guilty party in a verdict of guilty,[2] and be clearly referrable to the offense.[3]

Sec. 716. Fraud or imposition vitiates.—Whenever, after verdict, it appears that a fair trial, by an impartial jury, has been prevented by any fraud or imposition, that was unknown to the party injured thereby, and that could not have been prevented by proper vigilance on his part, the court, on application, will set aside the verdict and grant a new trial.[4]

Sec. 717. When on illegal basis.—If it appears upon the face of the verdict that the assessment has been estimated on an erroneous and illegal basis, it may be set aside upon motion. Judgment should not be entered thereon.[5]

Sec. 718. Right verdict based on wrong reasons.—A jury may have found a right verdict based upon wrong reasons, but, if the verdict is clearly right under the conceded facts of a case, and such as have been properly determined by the jury, it will not be set aside.[6]

Sec. 719. Effect of misconduct of jury upon.—If the jury have been guilty of misconduct which has affected the substantial rights of a party, it cannot stand [7] Misconduct may arise from improper communications by jury or jurors with third persons,[8] with the bailiff,[9] parties to the action,[10] between jurors themselves,[11] by use of intoxicating liquors,[12] by reading newspapers,[13] all of which questions have been fully discussed in the chapter, "Conduct of Jury."

Sec. 720. Judgment on.—When a trial by jury has been had, judgment must be entered by the clerk in conformity to the verdict unless the verdict is special, or the court order the case to be reserved for future argument or consideration.[14] When the verdict is special, or when there is a special finding on particular questions of fact, or when the case is reserved, the court

[1] Fries *v.* Mack, 33 O. S. 52.
[2] Williams *v.* State, 6 Neb. 334.
[3] Campbell *v.* Queen, 2 Cox C. C. 463.
[4] Hayward *v.* Calhoun, 2 O. S. 164.
[5] Holden *v.* Belmont, 32 O. S. 585
[6] King *v.* Herb, 18 O. C. C. 41.
[7] Whittaker's Code, sec. 5305.
[8] *Ante*, sec. 603.
[9] *Ante*, sec. 604.
[10] *Ante*, sec. 606.
[11] *Ante*, sec. 607.
[12] *Ante*, sec. 608.
[13] *Ante*, sec. 609.
[14] Whittaker's Civ. Code, sec. 5326.

will order what judgment is to be entered.[1] When, upon the statements in the pleadings, one party is entitled by law to judgment in his favor, judgment may be so rendered by the court, although a verdict has been found against such party.[2]

No judgment can be rendered upon a finding of facts which are in the nature of evidence only, and are not, in law, conclusive upon the question at issue.[3]

In some instances judgment may be entered, notwithstanding the verdict—*non obstante veredicto.* This can only be given for a plaintiff. The remedy for a defendant is to have the judgment arrested.[4] Judgment may be entered irrespective of the verdict where the only issue is upon the truth of immaterial issues;[5] or where the matter pleaded, even if found true by the jury, will not constitute a bar or an answer.[6]

A judgment on a general verdict of guilty on an indictment containing some good and some bad counts, is not erroneous, because not rendered with express reference to the good counts.[7] Judgment should not be entered upon a general verdict of guilty on an indictment for horse stealing and grand larceny where the value of the property is assessed in gross, without finding the amount charged in each count.[8]

Sec. 721. Impeaching verdict.—It is a well settled general rule of law that affidavits of jurors cannot be received for the purpose of impeaching their verdict, such as by showing misconduct of jurors while engaged in deliberations, nor for the purpose of showing bad motives or fraudulent conduct of jurors in relation to the cause on the trial.[9] Nor will affidavits stating that they misunderstood the charge of the court be received on motion to set aside the verdict.[10] Nor will evidence of what a juror said after the rendition of a verdict as to any improper occurrences in the jury-room be received to invalidate the verdict.[11] But where, on a motion for a new trial, other testimony is given to the court tending to show that the jurors had in their possession a newspaper, or part of a newspaper, containing a part of the charge of the court, affidavits of jurors may be received to show what the paper was, if their permission and use of it does not involve a charge of improper motives on the part of the jurors.[12]

[1] *Id.*, sec. 5327.
[2] *Id.*, sec. 5328.
[3] Leach *v.* Church, 10 O. S. 148.
[4] Buckingham *v.* McCracken, 2 O. S. 287.
[5] Tootle *v.* Clifton, 22 O. S. 247.
[6] Sullenberger *v.* Gest, 14 O. 204.
[7] Boose *v.* State, 10 O. S. 575; Bailey *v.* State, 4 O. S. 440.
[8] Barton *v.* State, 18 O. 221.
[9] Wertz *v.* Railroad Co., 30 W. L. B. 280; Farrar *v.* State, 2 O. S. 54. See Elliott's Gen. Pr., sec. 949.
[10] Holman *v.* Riddle, 8 O. S. 384.
[11] Devere *v.* State, 5 O. C. C. 509.
[12] Farrar *v.* State, 2 O. S. 54.

And affidavits of jurors are admissible to show that the verdict as received and entered of record, by reason of a mistake in drawing it, or of a mistake made in open court when it was received, does not embody the true finding of the jury.[1]

[1] Wertz *v.* Railroad Co., 30 W. L. B. 280.

CHAPTER XXXIII.

VARIANCE.

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SEC. 722. Variance defined—Scope and meaning.—The purpose of pleading is to apprise the parties of the issues, so that they may prepare for the introduction of proof. The proof must correspond and be within the issues.

Variance is a disagreement between the allegations in a pleading and the proof offered to support them.

At common law a variance was followed by disastrous results. A variance was fatal to the party holding the affirmative, the jury being bound to find the issue against him. But very early in English jurisprudence, recognizing the great expense, delay and failure of justice which followed the rigid enforcement of this rule, the common law was modified by the statute allowing amendments to be made in pleadings when the variance is im-

material. The established common-law rule was, that when the disagreement between the proof and allegation was upon a material point, it was fatal to the party on whom proof rested as a total failure of evidence. But the rule was not so rigorously observed as to compel the party on whom the proof rested to make good his allegation to the letter but only the substance, and a variance in form or in a matter immaterial was disregarded.[1]

Sec. 723. The code variance.—The codes, following to some extent the common-law variance, have prescribed three kinds: 1st. An immaterial variance; 2nd. When the proof varies from the allegation; 3rd. Where the evidence wholly fails to agree with the allegation.

Under the Ohio code, when the allegation in its general scope and meaning is not proved, it is not deemed a case of variance but a failure of proof.[2]

Thus, we have in the Ohio code really but two kinds of variance, the one material, the other an immaterial variance, and what was termed a fatal variance at common law is now styled a failure of proof. The same results, therefore, do not follow a variance under our practice as did at common law. An immaterial variance is of little consequence; a material variance may be easily remedied without serious consequences, in the form prescribed by the code. As shown in the preceding section, a disagreement upon a material point was fatal. The code defines a material variance as one which has actually misled a party to his prejudice, but does not treat it with such severity as did the common law. If the party who has suffered by a variance upon a material matter makes proof of that fact, the court may order the pleadings to be amended upon such terms as may be just.[3] And so may an amendment be ordered in case of an immaterial variance.[4] Under the liberal powers of amendment granted by the code the harshness of the rule is taken away. The court has the discretion to grant leave to amend in case of either an immaterial or material variance. Where there is a failure of proof, an amendment will not ordinarily be allowed unless clearly in furtherance of justice.[5]

Sec. 724. When variance deemed material.—No variance between the allegation in pleading and the proof shall be deemed material, unless it has actually misled the adverse party to his

[1] Andrews Stephen's Pldg., sec. 90. The common-law rule in regard to variance has been so modified, and courts are so liberal in allowing amendments, that it is not so important at the present day as it was formerly. Shipman's Com. Law Pld., p. 340.

[2] Whittaker's Code, sec. 5296.

[3] Whittaker's Code, sec. 5294.

[4] Whittaker's Code, sec. 5295.

[5] Maxwell's Code Pldg., 572.

prejudice in maintaining his action or defense upon its merits.[1] The variance, to be material, must be upon some substantial matter or elements of the case,[2] and must not arise upon legal conclusions from the facts drawn by the pleader.[3]

The provision has reference to mere discrepancies between the issues raised by the pleadings and the evidence offered in support thereof, and not to cases where the same are not proven at all.[4]

Sec. 725. Same, continued.—Amendment when variance material.—It has been said that the test of variance which at common law would defeat a recovery, was whether the case proved was a new one. Necessarily at common law the boundaries between the various common-law actions had to be carefully observed, as the procedure consisted largely of forms, and the consequences of a mistake in the application of the remedy were very material. An amendment could not be made so as to change the form of action, and hence a non-suit would follow. But the test by which a variance will be deemed material under the code provision is determined by the fact that the adverse party has been misled. And unless this fact is made to appear in the proper manner, the variance may be disregarded by the court and considered and treated as an immaterial one.

The code provides that when it is alleged that a party has been so misled, that fact must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled. In such case the court may, in its discretion, order the pleading to be amended upon such terms as are just.[5] The variance may sometimes appear on the face of the pleadings,[6] though it is more frequently determined by proof *aliundi.*[7] Where leave to amend is asked on the grounds of variance between pleading and proof, it may very properly be refused unless the statutory affidavit is filed, showing wherein the applicant has been misled to his prejudice.[8] The fact that the party has been misled must be proved to the satisfaction of the court, and it must also be shown in what respect he has been misled.[9] Whether the court will require any further showing to be made than the affidavit of the party is probably discretionary. Whether

[1] Whittaker's Code, sec 5294.

[2] Dott *v.* Denny, 6 Oregon, 156; Piatt *v.* Longworth, 27 O. S. 159.

[3] Piatt *v.* Longworth, *supra.*

[4] Thompson on Trials, sec. 2252; Waldhier *v.* R. R. Co., 71 Mo. 514, 516; Fuher *v.* Villwock, 14 O. C. C. 389.

[5] Whittaker's Code, sec. 5294; Barnett *v.* Ward, 36 O. S. 111–12.

[6] Place *v.* Minster, 65 N. Y. 87, 104.

[7] Catlin *v.* Gunter, 11 N. Y. 368; 62 Am, Dec. 113.

[8] Bank *v.* Wills, 79 Mo. 275, citing Shelton *v.* Durham, 76 Mo. 434; Meyer *v.* Chambers, 68 Mo. 626 and other cases.

[9] Barnett *v.* Ward, 36 O. S. 107.

the variance be material or not, it is not error to refuse leave to amend if the facts proved do not show a good cause of action.[1] If it is not a material variance, the verdict and judgment should stand, though not in harmony with the charge of the court.[2] And so the power of the court to grant leave to amend even in case of a material variance being discretionary, there can be no complaint upon error unless there has been an abuse of discretion.[3] And the fact that a pleading is not amended to conform to the proof does not constitute grounds for reversing a judgment upon error.[4] If the facts proved are entirely different from those alleged, so much so as not to entitle the party to go to the jury, and the party does not amend so as to conform to the evidence, it is considered under the code a failure of proof and not variance.[5]

Sec. 726. Immaterial variance.—An immaterial variance is one where the discrepancy is so slight and so unimportant that it does not mislead or prejudice the adverse party.

When the variance is not material, the court may direct the fact according to the evidence, and may order an immediate amendment without cost.[6] When the variance is not material an amendment is unnecessary, and a court cannot, in such a case, be justified in arresting the cause from the jury and in directing a non-suit.[7] Whether a variance is material or not, it is not error to refuse leave to amend if the facts do not constitute a cause of action.[8] In criminal law, however, the rule as to admission of evidence clearly at variance with the allegations are more strictly observed, and it is considered reversible error to admit such evidence.[9] When there is no objection made to a variance, it is to be regarded, under the code, as immaterial.[10]

Sec. 727. Form of affidavit to show material variance.—

In the Court of Common Pleas of ——— County, Ohio.

A. B., *Plaintiff*,
v.
C. D., *Defendant*.
} Affidavit to show variance.

The State of Ohio, ——— County, *ss*.

C. D. being first duly sworn, says that he is the defendant in

[1] Ferguson *v.* Miami Powder Co., 9 O. C. C. 445.
[2] Kolling *v.* Bennett, 18 C. C. 425.
[3] Fuher *v.* Villwock, 14 O. C. C. 389.
[4] Sibila *v.* Bahney, 34 O. S. 399.
[5] Waldhier *v.* Railroad Co., 71 Mo. 514.
[6] Whittaker's Code, sec. 5295.
[7] Ferguson *v.* Miami Powder Co., 9 O. C. C. 445; Barnett *v.* Ward, 36 O. S. 107.
[8] Ferguson *v.* Miami Powder Co., *supra;* Sibila *v* Baheny, 34 O. S. 399.
[9] Hart *v.* State, 20 Ohio. 49.
[10] Insurance Co. *v.* Bonnell, 39 O. S. 367.

the above entitled action, and that at the trial of said cause, before Honorable ———, Judge of the Court of Common Pleas, and a jury duly empanelled, the said plaintiff introduced the following evidence in support of his cause of action. [*Here state so much of the evidence as may be necessary.*]

Defendant states that there is a material disagreement between said evidence and the allegations of the plaintiff in his petition, in this, to wit:

[*Here state the allegations of the petition sufficiently to show the variance.*]

Defendant further states that by reason of such disagreement between the allegations and proof, he has been misled in the following manner: [*Here state particularly how the party has been misled.*]

Sec. 728. Failure of proof.—When the allegation of the claim or defense, to which the proof directed, is disproved, not in some particular or particulars only, but in its general scope and meaning, it shall not be deemed a case of variance, but a failure of proof.[1] A failure of proof and a variance are clearly distinguishable. When there is no case whatever proved, there is a failure of proof;[2] but where all of a charge or claim is not proven but a portion is, that not proven may be treated as surplusage, and a non-suit refused.[3] As for example, where the complaint contains an allegation of a cause of action in contract not sounding in tort, although it may charge tortious acts on the part of the defendant, the plaintiff will be allowed to recover, upon the allegation of his complaint resting on contract, and the allegation of wrong may be treated as surplusage.[4] But where it is alleged that a defendant by means of fraud obtained goods from the plaintiff and converted them to his own use, and the proof in support thereof shows that the defendant is a *bona fide* purchaser from one in possession, but without title, there can be no recovery, because of the failure of proof.[5] And so in an action for the recovery of real estate, to which is interposed a general denial, and the proof shows an equitable title in the defendant, there is a failure of proof. Such a defense must be specially pleaded.[6] If the right of a plaintiff to sue depends upon his title to the property sued for, and this is not taken advantage of by demurrer or answer, as it may be, and the plaintiff fails to show such title, there is a failure of proof.[7] An amendment will not be allowed in case of a failure of proof,

[1] Whittaker's Civ. Code, sec. 5296.
[2] Dunn *v.* Durant, 9 Daly, 389.
[3] Dodge *v.* Eckert, 24 N. Y. S. 1074.
[4] Dodge *v.* Eckert, *supra.*
[5] Dean *v.* Yates, 22 O. S. 388.
[6] Powers *v.* Armstrong, 36 O. S. 357.
[7] Reed *v.* Jordan, 12 O. O. C. 161.

unless it may be done under the provision allowing amendments in furtherance of justice.[1] A question of failure of proof may be raised by a motion for a non-suit, or for the direction of a verdict, or demurrer to the evidence, and must be raised in the trial court to be made available upon error.[2]

Sec. 729. Illustrations.—In the preceding sections the general principles governing the subject of variance have been discussed; in the following sections illustrations of what are and what are not variances in particular subjects and actions are given.

Sec. 730. Illustrations—Account.—If, in an action on a book account an item thereof is not proved to the full extent claimed in the petition, but the variance between the allegations and proof is not such as to mislead the defendant in regard to the nature and character of the claim, such variance will not prevent a recovery so long as the facts proved show a good cause of action,[3] or, if the proof shows that the amount sued for is merely interest on an account, there is no variance.[4]

Sec. 731. Illustrations—Account stated.—To maintain an action on an account stated, the plaintiff must prove an account stated, that is, one which has been balanced and rendered with consent of the parties thereto, express or implied, as distinguished from an account closed.[5]

Sec. 732. Illustrations—Actions against common carriers.—A common carrier may limit its liability by special contract for losses happening without its fault, which will in such event relieve itself only from the common-law liabilities.[6] In declaring for loss against a carrier, the special contract, if there be one, must be pleaded, and if it be merely a general or ordinary engagement, that must be so stated. If the suit be upon a general or ordinary engagement it cannot be supported by proof of a special contract, and a variance in such case would arise.[7] Immaterial matters of description such as a failure to comply with a contract to carry and deliver a draft alleging that it was signed "John Q. Jackson" and the proof showing that it was signed by such a person as agent, will not cause a material variance.[8]

[1] Egert *v.* Wicker, 10 How. Pr. 193.
[2] Cummings *v.* Petsch, 41 Minn, 115.
[3] Ralston *v.* Kohl, 30 O. S. 92; Beninger *v.* Hees, 41 O. S. 64, 69.
[4] North Star Boot and Shoe Co. *v.* Stebbins, 3 S. D. 540; 54 N. W. 593.
[5] Bass *v.* Bass, 8 Pick. 187; Volkening *v.* DeGraaf, 81 N. Y. 268.
[6] Kinkead's Code Pldg., sec. 402.
[7] Davidson *v.* Graham, 2 O. S. 132.
[8] Zeigler *v.* Wells, Fargo & Co., 28 Col. 263.

Sec. 733. Illustrations—Consideration.—If it be alleged that the consideration for a transfer of land was the satisfaction of a judgment, and the proof shows that the satisfaction of the judgment was but a part of the consideration, such variance may be regarded as material.[1] But an averment of a cash consideration and proof that the same consisted of a draft is an amendable variance.[2]

Sec. 734. Illustrations—Actions on contracts.—At common law when the action was founded upon a written contract there was a distinction observed between allegations of matters of essential description and matters of substance. It was necessary to prove the former strictly, while the latter need only be proved substantially. A variance as to the matters of substance was a disagreement between the allegation and proof in some matter which in point of law was essential to the charge or claim. When the variance related to a matter of description, or to substance, it was fatal unless an amendment was allowed. But under the code no variance is material unless the party is actually misled, and a variance is seldom, if ever, fatal, as an amendment is allowed. There is a distinction between material provisions of a contract and material allegations founded upon those provisions. If all the material provisions are set out, and a breach alleged, still only those essential to the recovery need be proved; all others, unless descriptive, are redundant and need not be proved although alleged. As a question of pleading, only those provisions necessary to entitle the plaintiff to a verdict are material.[3] This rule will apply equally to a verbal or written contract. Evidence proving a verbal contract or a variation of the written one cannot be admitted, unless an amendment be made.[4] If the action be for a breach of a contract, it is not essential to recovery that all the terms of the contract as alleged in the petition be sustained by evidence.[5] And where several letters are relied upon to show a contract, a literal variance between one of them as presented in evidence, and as set forth in the petition, will not be cause for excluding it from the evidence.[6]

Nor will there be a variance when the plaintiff sets forth a claim upon a contract for procuring a loan when the proof shows that he has performed services in securing the money ready to

[1] Reynolds, *v.* Morris, 7 Ohio St. 310.

[2] Nash *v.* Towne, 5 Wall, 689.

[3] Gaines *v.* Union, &c., Insurance Co., 28 O. S. 418.

[4] Phillip *v.* Van Schaick, 37 Ia. 229; Harrison *v.* R. R. Co., 50 Mo. App. 332; Halpin Mfg. Co. *v.* School District, 54 Mo. App. 371; Ranson *v.* Stanberry, 22 Iowa, 334.

[5] Nolte *v.* Hill, 36 O. S. 186, 189.

[6] Kimball *v.* Moreland, 55 Ga. 164.

be loaned,[1] nor where a specific sum for services is claimed under contract and the evidence shows that the plaintiff is entitled to recover what may be a reasonable sum without regard to specific contract as upon *quantum meruit*.[2] But where an unconditional contract is declared upon and the evidence discloses a conditional one different from that alleged, there is a variance,[3] and so where the complaint sets forth an express contract alleged to have been made between the plaintiff and defendant, and the proof shows a contract made with a third person, there is a variance.[4]

A plaintiff basing his right to recover upon a special contract cannot in support of his claim, rely upon the evidence introduced by the defendant which shows a different contract, but must prove his own case.[5] But the defendant may show under a general denial a contract different from that alleged by plaintiff.[6]

1. *Building contract.*—Where the action is upon a building contract, substantial compliance with the terms thereof only being essential to authorize recovery of the agreed price for the work performed by a contractor, a variance will not arise if the evidence discloses technical and unimportant omissions or deviations.[7]

2. *Joint contracts.*—The common-law rule was that where a joint contract was the subject of an action, recovery must be had against all or none, has been modified by the code so that judgment may be rendered against one or more defendants. Where it turns out upon trial that only one or more of several defendants in such joint action are liable, and where a joint action is brought against several persons and the evidence places the liability upon one of such defendants, there is no variance. Judgment may be rendered accordingly without a new action.[8] Where it is apparent upon the face of the pleading that there is no joint liability on the part of two or more defendants against whom a joint liability is alleged, the question must be raised, or the advantage of this apparent variance should be taken by demurrer.[9]

3. *Ex contractu—Ex delicto.*—By almost unanimous consent of all judicial tribunals it is agreed that where the cause of action is one *ex contractu* and the proof adduced shows it to be *ex*

[1] Engle *v.* Hardt, 56 Wis. 456.

[2] Sussdorff *v.* Schmidt, 55 N. Y. 319, 324: Ralston *v.* Kohl, 30 O. S. 92, 96.

[3] Shomo *v.* Rausom, 92 Ga. 97; 18 S. E. 534.

[4] Haynes *v.* Railroad Co., 7 Wash. 211.

[5] Cremer *v.* Miller, 57 N. W. 318; 56 Minn. 52.

[6] McGill *v.* Hall, 26 S. W. 132.

[7] Mehurin *v.* Stone, 37 O. S. 49.

[8] Lampkin *v.* Chisom, 10 O. S. 351; Humphries *v.* Hoffman, 33 O. S. 395; Roby *v.* Ramsberger, 27 O. S. 674, 676; Aucker *v.* Adams, 23 O. S. 543; Hempy *v.* Ransom, 33 O. S. 312; Smith *v.* Smith, 21 W. L. B. 295.

[9] Bartges *v.* O'Neill, 13 O. S. 72.

delicto, no recovery can be had.[1] In some cases difficulty may be encountered in determining from the allegations the exact nature of the action, because the contract may be intermingled with some wrong committed through fraud or otherwise, it being difficult to draw the dividing line or to determine which feature, the contract or the wrong, predominates. It is apparent, therefore, that a general rule or formula by which it can be determined when a variance in such cases will arise cannot be made. In view of this fact when such a case is presented to the pleader, considerable care should be exercised in declaring in plain terms either *ex contractu* or *ex delicto* so as to avoid serious consequences in marshaling his proof.[2]

Sec. 735. Illustrations — Equitable actions.— Although the formal distinction between actions legal and equitable has been abolished, it is still necessary to set forth the cause of action as one in law or one in equity, with much the same particularity so as to leave no doubt as to what kind of relief, legal or equitable, is sought. Relief cannot be granted under any specific head of equity, unless it be set forth in the pleading. As for example, where relief is sought against actual fraud, the plaintiff cannot obtain a decree by establishing facts independent of fraud, which might of themselves create a case under a distinct head of equity from that which would be applicable to the case of fraud originally stated.[3] Where it is alleged that an instrument was executed through mistake on the part of the plaintiff, and by the defendant with fraudulent knowledge thereof, it will not be a material variance if the proof shows that it was through a mutual mistake.[4] Evidence cannot be introduced to show mistake, unless the same be alleged in the petition.[5]

Sec. 736. Illustrations—Actions on instruments required to be in writing.—It was held in an early case in this State that where a promise, which the law requires to be in writing, is declared upon, evidence cannot be introduced to show that the same was in writing, unless that fact is alleged in the pleading.[6] This seems now to be doubtful, as there is a presumption that it was in writing.[7]

Sec. 737. Illustrations—Actions on joint and several liability.— Where an action is brought upon a cause of action which is

[1] Dean *v.* Yates, 22 O. S. 388, 397; Ross *v.* Mather, 51 N. Y. 108; Crothers *v.* Acock, 43 Mo. App. 318.

[2] See a very full discussion of this in Pomeroy's Code Rem., secs. 558, 563.

[3] Hoyt *v.* Hoyt, 27 N. J. Eq. 399.

[4] Paisley *v.* Casey, 18 N. Y. App. 102.

[5] Eldridge *v.* McAdams, 24 S. W. 310 (Tex. Civ. App.).

[6] Headington *v.* Neff, 7 Oh. St. 229, 231.

[7] Kinkead's Plg., sec. 65–13; Marston *v.* Sweet, 66 N. Y. 206.

claimed to be joint and several against the defendants and it is apparent upon the face of the petition that it is not, the defect may be taken advantage of by demurrer. And if the objection be not so taken, it may be raised by answer. In such case, if the plaintiff's evidence should show that one or more of the parties have no cause of action, there is a variance.[1]

Sec. 738. Illustrations—Actions on judgments.—Where a judgment is declared upon in an action, but the complaint is silent as to costs, and the record introduced shows costs, there is no variance.[2] But if the judgment is alleged to have been against but one person, and the evidence shows a judgment against two or more persons, a variance arises.[3]

Sec. 739. Illustrations—Actions for malicious prosecution.—Where an action is brought for a malicious prosecution, but the proof shows that the arrest complained of was made illegally and with force, it will be a variance, but an amendment may be made to conform the pleadings to the proof.[4]

Sec. 740. Illustrations—Actions for money had and received.—An action for money had and received is one which is brought for the recovery of money which has been had and received by another in such a manner that justice and honesty require that he should return, and now extends also to cases cognizable only in equity. There is no element of contract in it other than what may arise from the peculiar circumstances of the case, and then it is considered rather as an implied promise which arises from the peculiar liability or duty on the part of the defendant which may arise from the circumstances of the case. The evidence to support such an action, therefore, must not be such as to show an express contract, and if of that character there will be a variance.[5]

Sec. 741. Illustrations—Variances in name—Civil cases. In the author's work on Pleading[6] the rule as to pleading the full christian and surname of the parties to an action was discussed. The view was there expressed that while the practice of suing parties by their initial letters is loose and vicious, yet in the light of modern practice it cannot be considered as a fatal defect because courts will always permit or require the parties to set

[1] Bartges *v.* O'Neill, 13 O. S. 72; Masters *v.* Freeman, 17 O. S. 323.

[2] Adair *v.* Rogers, W. 428.

[3] Schertz *v.* Bank, 47 Ill. App. 124; Newburg *v.* Munshower, 29 O. S. 617.

[4] Spicer *v.* Steinruck, 14 O. S. 213.

[5] Distler *v.* Dabney, 3 Wash. St. 200; Clark *v.* Sherman, 5 Wash. St. 681; Kinkead's Code Pleading, secs. 826–7.

[6] Sec. 48.

forth the full name. We still adhere to this view, and do not think that the defect should be considered a fatal one when it is perfectly apparent in any case that it is only formal and does not affect a substantial right. In considering the question at this point with reference to the subject of proof it may be stated that the object of the rule in requiring the pleadings to set forth the full christian name is to sufficiently identify the parties. If, therefore, a pleading which has declared against a defendant only by his initial letters has been allowed to proceed until the trial is reached and the proof shows that the defendant is the identical person set forth in the pleading, there can be no variance or failure of proof,[1] and hence there is no real difficulty or objections to the method of pleading by the initial letter except that we have come to consider it bad practice ; but the objections are at best technical, although it is a safeguard which ought to be provided at the outset of an action. It is not intended from what has been said to sanction the practice at all of declaring by initial letters. A mis-spelling of the name of a party is an immaterial variance.[2]

Sec. 742. Illustrations—Actions for negligence.—The following are illustrations of the doctrine of variance as applied to actions for the recovery of damages for negligence. If the negligence charged against a railroad company consists in running cars and the evidence shows that the injury was caused by defective machinery or appliances, there is a variance.[3] So if the suit be brought by one as an employe and the evidence shows him to be a passenger,[4] and so where it is claimed or alleged that an injury occurred to one on the grounds of a railroad company by invitation, and the evidence shows that he was an intruder,[5] and so where the cause of action alleged in the petition is that the defendant erected a fence across the road, thereby causing the water to flow upon and obstruct the road, and the proof shows that the fence was in fact erected fifteen rods from the road,[6] the petition should be amended in such case if the testimony is objected to by the defendant whether he would be misled or not by the variance,[7] and so where an action is brought by an employe against a railroad company for negligence in moving a car under which he was working without notice or warning, and the proof shows that the failure in giving notice or warning was attributable to the foreman under whom the plaintiff was

[1] Cullers *v.* May, 16 S. W. 813 (Tex.)

[2] Bosley *v.* Pease, 86 Tex. 292.

[3] DeBolt *v.* Railroad Co., 27 S. W. 575; 123 Mo. 496.

[4] Evansville, &c., R. R. Co. *v.* Barnes, 36 N. E. 1092.

[5] Mexican National Railway Co. *v.* Crum, 25 S. W. 1126; 6 Tex. Civ. App. 702.

[6] Hill *v.* Supervisors, 10 O. S. 621.

[7] *Id.*

working and not to those engaged in moving the car.[1] Where the petition charges that a cellar was flooded by obstructing the street, and the evidence admitted shows that the flooding was occasioned by the wrongful opening of the sidewalk, making a channel through which the water was forced into the cellar by obstructions placed in the street by others, there is no material variance.[2] Nor is there a variance where the allegation is that a fence was out of repair and the evidence shows a defective gate.[3] And where a traveler on a public highway brings an action against a railroad company for injuries received by a collision with a passing train at a public crossing, alleged to have been caused by negligence in the management of the train, evidence that there was no sign board placed at such crossing may be introduced as reflecting upon the question of care exercised by the company, even though the want of such sign board is not alleged as a ground of negligence.[4]

Sec. 743. Illustrations—Actions on negotiable instruments.—Where suit is brought upon a note which is made payable to B., one of the executors of F., and the evidence offered at trial discloses that the note was payable to B. F., executors of F., it was held that it was a case not of mere statutory variance, such as may be cured by failure to make the requisite affidavit, but a failure of proof in a vital particular. The allegation in the complaint was one cause of action and the introduction of evidence established another and very different cause.[5] Under a plea of want of consideration for a note, evidence showing that the same was delivered upon conditions, constitutes a variance.[6] But if the defendant claims that a note sued upon is without consideration and void, but does not state the facts upon which he relies and the plaintiff does not require a statement of the facts on which the defense rests, any evidence may nevertheless be introduced tending to impeach or sustain the consideration.[7] In a suit brought against one who guaranteed the payment of an over due promissory note, the petition alleging that the defendant agreed to become such guarantor upon condition that the time for payment of the note be extended "until next spring," and the evidence shows that the extension was for one year, there is a variance.[8]

[1] Railway Co. *v.* Lavelley, 36 O. S. 221.

[2] Hoffman *v.* Gordon, 15 O. S. 211.

[3] Woods *v.* Railroad Co., 51 Mo. App. 500.

[4] Railroad Co. *v.* Whitacre, 35 O. S. 627.

[5] Faulkner *v.* Faulkner, 73 Mo. 327; Waldhier *v.* Railroad Co., 71 Mo. 514.

[6] Norris *v.* Tiffany, 26 N. Y. Supp. 750.

[7] Chamberlain *v.* R. R. Co., 15 O. S. 225.

[8] Banta *v.* Martin, 38 O. S. 534.

Sec. 744. Illustrations — Official misconduct.— In an action against an officer for default in executing process of execution, where the petition describes the process as having been issued upon a judgment recovered jointly against two defendants, evidence of a judgment rendered against both defendants in which only one of them was served with process does not support the petition.[1]

Sec. 745. Illustrations—Actions against partners.—Where a suit is brought against two or more defendants as members of a partnership, and the proof discloses that they are members of a corporation which is in fact a responsible party, there is a variance.[2]

Sec. 746. Illustrations—Actions against physician—Malpractice. —If an action be brought against a physician for malpractice and the proof shows that he is not a regularly practicing physician, but calls himself "cancer doctor" there is a substantial agreement between the allegation and proof.[3]

Sec. 747. Illustrations—Sales.—Where suit is brought for recovery upon a sale alleged to have been in writing, recovery may be had if the evidence discloses a verbal sale, as the allegation so far as averring the sale to have been evidenced by a written instrument is an averment of the evidence of the fact of sale, and may have been stricken out on motion for that reason. The issuable fact is the *sale*, and the manner in which it is made is purely a matter of evidence.[4]

Sec. 748. Illustrations—Slander.—In suits for slander it is the province of the jury to find what words were actually spoken, and the question whether or not they are the same that are charged in the petition must also be determined by the jury under proper instructions by the court.[5] It is not essential that all the words charged in the petition should be proved, but only that sufficient words be shown to establish the fact of slander. But if all of the words charged as having been uttered are necessary to constitute the slander, then they must be proved as charged. Words equivalent will not be sufficient.[6] If the charge be that a defendant falsely swore in a certain trial, naming it, a slight variance in the name of the case is immate-

[1] Newburg *v.* Munshower, 29 O. S. 617.
[2] Kelly *v.* Thompson, 5 Wash. 785.
[3] Musser *v.* Chase, 29 O. S. 577.
[4] Patterson *v.* Mining Co., 30 Cal. 360; Green *v.* Palmer, 15 Cal. 411.
[5] Birch *v.* Benton, 26 Mo. 153.
[6] Baker *v.* Young, 44 Ill. 42.

rial.[1] In charging a woman with sleeping with a man not her husband, the same may be sustained by proving that such a person was in bed with her, as it would be an immaterial variance.[2]

Sec. 749. Illustrations—Time or dates.—Whether or not a variance will arise when the proof does not correspond with the allegation as to the time or date upon which anything is said to have occurred or been done, must depend upon the character of the transaction and solely upon the allegation made in the pleading.

When the question of date or time is made by the pleading the very essence or gist of the cause of action, then the proof must correspond precisely with the allegation.[3] Illustrative of this doctrine is a cause of action brought to charge the cashier of a bank with negligence in protesting a note left for collection. Where the averment is that the defendant proceeded to make demand and gave notice of non-payment to the indorsers upon a certain day and the evidence shows that the demand is made on a day different from that alleged, the day being made by the allegation a material point, the action cannot be sustained by proof that the demand and notice were made upon a day different from that alleged.[4] But where the allegation as to time is not of an essentially descriptive character, an immaterial variance will not be followed by disastrous results. Thus, where time is not stated as descriptive of the date of an instrument, the fact that it is made at a different time from that made in the complaint will not be a fatal variance.[5] And it will not be error to permit a written contract of sale, the execution of which is admitted by the adverse party, to be offered in evidence, although it may bear a different date from that alleged, the date of the contract not being conclusive as to the time of delivery of the goods.[6] In a suit upon a contract to deliver cattle on a certain date, the date is not material, and evidence as to a different date should not be excluded.[7] And so in an action brought for the recovery of services performed under a verbal contract, where the evidence shows that the contract was made at a different time from that alleged in the petition, the court may properly permit the plaintiff to amend his petition so as to conform the date of the contract to the proof adduced.[8] There is no variance in a case where it is alleged that the defendant "in or about the

[1] Stallinger *v.* Whittaker, 55 Ark. 494.

[2] Barnett *v.* Ward, 36 O. S. 107.

[3] United States *v.* LeBaron, 4 Wall. 642; Beach *v.* Tooker, 10 How. Pr. 297.

[4] Hough *v.* Young, 1 Oh. 504, 508.

[5] Moore *v.* Gano, 12 Oh. 300; Bank *v.* Stephenson, 82 Tex. 435.

[6] Serviss *v.* Stockstill, 30 O. S. 418.

[7] Moorehouse *v.* Ry. Co., 18 S. W. 1086.

[8] Wolff *v.* Warrington, 6 W. L. B. 338

year 18—," acknowledged his indebtedness, and the evidence shows that he acknowledged the same in a different year.[1] Where a party is alleged to have had the ownership of property at a certain time, evidence may be introduced to show ownership prior to the time alleged.[2] But where a petition asks for interest upon a note or account from a given date, recovery cannot be had from a date prior to that stated in the petition.[3]

Sec. 750. Variances as applied to defenses.—The rule that the allegations and proof must correspond, applies also to defenses set up to a cause of action, though its operation is materially different by reason of the rule governing the admission of testimony under a general denial. The answer setting up the defense may contain either a specific or general denial, or new matter constituting a defense. The rules for the admission of evidence are only varied in the case of a general denial. The latter may be made only when the whole cause of action is assailed. Thus defenses which avoid but do not deny, should be specially pleaded, and cannot be shown under a general denial. The latter puts in issue every material allegation of the petition, and under it any evidence which directly tends to disprove the plaintiff's claim may be introduced. The defenses of payment, releases, accord and satisfaction, of arbitrament, etc., which do not deny but avoid the cause of action set forth by plaintiff, and under the general issue at common law could be shown, but under the code general denial cannot be shown.[4] Under a general denial in an action for damages for breach of a contract, a defendant may show cause for rescinding the contract;[5] and under a denial of negligence a defendant may offer proof of the manner and circumstances under which the complainant received the injury.[6] But under a denial of an agreement to arbitrate a defendant cannot introduce evidence to show that the arbitration was void because parties interested were minors.[7] Under the old practice a former recovery for the same cause of action could be given in evidence under the plea of the general issue, but under the code general denial this cannot be done.[8]

Sec. 751. Matters of description in criminal law.—The rule in criminal practice formerly was that when matters of description

[1] Beach *v.* Tooker, 10 How. Pr. 297.
[2] Russell *v.* Bradley, 47 Kas. 438.
[3] Phenix Insurance Co. *v.* Weeks, 26 Pac. 410.
[4] Schaus *v.* Manhatten Gas Light & Co., 36 N. Y. Super. 262.
[5] Stahelin *v.* Solle, 87 Mich. 124.
[6] Valley Ry. Co. *v.* Ross, 9 O. C. C. 201.
[7] Chambers *v.* Ker, 6 Tex. Civ. App. 373; 24 S. W. 1118.
[8] Hendrick *v.* Decker, 35 Barb. 298.

were made in an indictment, it was necessary to prove the same strictly as alleged, and this now prevails in some jurisdictions.[1] And in Ohio, prior to the adoption of the criminal code of 1869, variances in matters of description were fatal. As for example, where a person was accused with stealing "grey horse" the same could not be supported by proof that he stole "grey gelding,"[2] and a charge of burning "stacks of wheat" could not be supported by evidence of burning "shocks of wheat."[3] Nor could an indictment for stealing bank bills be sustained by proof that the persons stole the orders of a railroad company.[4]

But by the enactment of the criminal code, the rules of common law have been essentially modified and the practice governed solely by statute. It was provided that when, on the trial of an indictment, there appears to be any variance between the statement in such indictment and the evidence offered in proof thereof, in the Christian name or surname, or both Christian name and surname, or other description of any person therein named or described, or in the name or description of any matter or thing therein named or described, such variance shall not be deemed grounds for an acquittal of the defendant, unless the court before which the trial is had finds that such variance is material to the merits of the case, or may be prejudicial to the defendant.[5] So that under this statute the question of the materiality of a variance in criminal procedure must be determined by the court,[6] and where no objections are made to a variance and none appear in the record, it will be presumed upon proceedings in error that the same was not material to the merits of the case nor prejudicial.[7] The strictness of the ancient rules is by this provision much relaxed. That a variance may be deemed ground for acquittal, it must be material, such as to have misled the accused to make his defense, or to have exposed him to the charge of being put again in jeopardy for the same offense.[8] But the reality of the transaction should be regarded rather than the technicalities as formerly. If a man be charged with killing another, the killing is the fact to be shown, and it matters not whether the indictment charges that it was done with a rock, and the proof shows that it was done with a stick, so long as the fact that the accused did the killing is established. The proof might show that the killing was done in other ways from that stated in the indictment and the variance

[1] Bishop Cr. Pr., sec. 488.
[2] Hooker *v.* State, 4 Oh. 348.
[3] Denbow *v.* State, 18 Oh. 11.
[4] Grummond *v.* State, 10 Oh. 511.
[5] R. S., sec. 7215.
[6] Mead *v.* State, 26 O. S. 505.
[7] Mulrooney *v.* State, 26 O. S. 326, 329.
[8] Harris *v.* People, 64 N. Y. 148.

be immaterial.[1] So it has been held that a charge in an indictment that the defendant carried away "one bushel of a certain cultivated plant and vegetable production commonly called corn," is sustained by proof that the corn stolen was standing and growing corn;[2] and in an action against a defendant for violation of a law regulating the liquor traffic, the allegation described the place where the accused was alleged to have committed the offense as a room and the evidence that it was a cellar, a grocery, or a dwelling house, is admissible if it tends to show the character of the place as a public resort.[3] And so where the indictment charges a defendant with stealing silver ware and the proof shows that the ware stolen was merely plated. In the absence of a finding that it was prejudicial to the defendant, the variance will not be considered fatal.[4] So where the ownership of a building from which goods are alleged to have been stolen is declared in the indictment to have been in two or more persons and the evidence discloses that it was in fact owned by but one of them, it relates to the description of the matter contained in the indictment and falls within the statute and may be regarded as an immaterial variance.[5] If a homicide is charged to have been committed with a gun, and the proof shows that the defendant used a pistol;[6] or if the killing is charged to have been done with a bowie-knife and the evidence shows that it was done with a butcher knife,[7] the variance is immaterial. But the description in the indictment must correspond with the statute defining the crime. If the offense, according to the statute consists in breaking into a store house and the indictment charges that the person broke into a store room, it has been held insufficient.[8] And where an indictment alleges a sale of liquors to have been made at the grocery of M., in the township of A., and the only proof is of a sale at the grocery of M., in the township of G., the variance between the allegation and the proof is fatal.[9] Or if the indictment charges the defendant with having forged a promissory note, or a check, and the proof shows that it was an indorsement thereof, there is fatal variance.

Sec. 752. Variance in criminal law—Names.—As appears in the preceding section according to the statute a variance between the statement in an indictment and the evidence offered in the christian name or surname of any person therein named or

[1] State *v.* Gould, 90 N. C. 658, and cases cited.
[2] Wiswell *v.* State, 21 O. S. 658.
[3] O'Keefe *v.* State, 24 O. S. 175.
[4] Goodall *v.* State, 22 O. S. 203.
[5] Mulrooney *v.* State, 26 O. S. 326.
[6] Turner *v.* State, 12 So. 54; 97 Ala. 57.
[7] Hermandez *v.* State, 22 S. W. 972; 32 Tex. Cr. App. 271.
[8] Hager *v.* State, 35 O. S. 268.
[9] Moore *v.* State, 12 O. S. 387.

described, shall not be deemed ground for an acquittal of the defendant, unless the court finds that such variance is material to the merits of the case.[1] Thus a variance in a charge for arson between the allegation of the indictment descriptive of the insurer of the building and the proof in support thereof, is not prejudicial unless it be material.[2] A description of a person as "Elisha Davidson" in a charge for murder, is not in the absence of statute supported by proof that it was "Elisha B. Davidson," but as it comes within the statute, it remains for the court to determine whether it is material and prejudicial. The court must not invade the province of the jury by saying that the person intended to be described in the indictment is the same person as that described in the proof, and that it arose from a mistake. The jury should be instructed that if they found that the deceased, Elisha B. Davidson, was the person intended by the grand jury under the name of Elisha Davidson, the variance is immaterial, and the defendant may be convicted.[3] When, on a trial for forgery, a variance is alleged between the name of the forged instrument and the name appearing in the indictment, if the variance is plain, such indictment ought to be allowed to go in evidence; but if the forged name is uncertain, and susceptible of being read as agreeing with the name stated in the indictment, it is not error to submit the question to the jury.[4] Where a person is described in an indictment as "Curtis Pratt," which is his true name, a transcript describing him as "Curt Pratt" may be admitted in evidence, as the variance is immaterial.[5]

Sec. 753. Variance in criminal cases—Miscellaneous.—A charge in an indictment with cutting with intent to kill, is not sustained by proof that the cutting was done with intent to wound;[6] nor is a charge that a defendant obtained money from A. B. by false pretenses, sustained by proof that by false pretenses he procured A. B. to indorse a forged check and then sold the check for money, and that afterwards A. B. paid the check;[7] nor is an indictment for selling and bartering counterfeit bank notes sustained by proof of uttering and publishing counterfeit bank notes;[8] nor can two persons charged with the commission of a joint offense be convicted upon proof that each one committed an act constituting an offense similar to the act charged in the indictment.[9]

[1] *Ante*, sec. 751.
[2] Evans *v.* State, 24 O. S. 458.
[3] Mead *v.* State, 26 O. S. 505.
[4] Turpin *v.* State, 19 O. S. 540, and cases cited.
[5] Lytle *v.* State, 31 O. S. 196.
[6] Barber *v.* State, 39 O. S. 660.
[7] Baker *v.* State, 31 O. S. 314.
[8] Vanvalkenburg *v.* State, 11 Ohio, 404.
[9] Stephens *v.* State, 14 O. 386.

In an indictment against a defendant for embezzling the funds of an organized "borough and village," proof that the real owner was a village and not a "borough and village" is not objectionable;[1] and where the charge is larceny of property belonging to one person and the proof shows that it belonged to two persons, as partners, the accused may be found guilty, and the variance is not material;[2] and so in a prosecution for having counterfeit notes in possession, proof that other counterfeits were found secreted in the prisoner's house, and in the possession of his house, is admissible.[3] Where two counts in an indictment for fœticide charges that the crime was committed by means of an instrument, as well as by means of a poisonous drug, the court may properly refuse to charge that if the destruction of the fœtus was the combined effect of the instrument and the drug, and was not caused by either, there can be no conviction.[4] And where the charge is a single illegal sale of liquor the State should be restricted to the single sale and not be permitted to prove others.[5] And so where the charge is for an assault and battery, proof that the parties fought by agreement cannot be admitted.[6]

Sec. 754. Proof of date of commission of crime.—In proving the date of the commission of a crime alleged in an indictment, it is not necessary to prove the precise day on which the same is alleged to have been committed, but merely that it was committed at some time before the indictment was found.[7]

Sec. 755. Objections must be taken, when and how.—Under the old practice a question of variance could be raised by a demurrer to the evidence, where the case was wholly disproved. But as we have no such such thing under our code as a fatal variance, having but two kinds of variances—material and immaterial—we must look to the code for the manner of raising objections because thereof. Objections to evidence because of variance must be taken at the trial and at the time it is offered,[8] and cannot be made for the first time on a motion for a new trial,[9] nor can it be raised for the first time in proceedings in error, as a reviewing court will not consider it in the absence of

[1] Brown *v.* State, 18 O. S. 496.
[2] Lasure *v.* State, 19 O. S. 43.
[3] Hess *v.* State, 5 O. 5.
[4] Tabler *v.* State, 34 O. S. 127.
[5] Stockwell *v.* State, 27 O. S. 563.
[6] Champer *v.* State, 14 O. S. 437.
[7] Clarke *v.* State, 16 S. E. 96; 90 Ga. 448; Jackson *v.* State, 88 Ga. 787; Bishop's New Cr. Pr., sec. 400, par. 2.
[8] Roberts *v.* Graham, 6 Wall. 578, 581; Kroegher *v.* McConway, &c., 23 Atl. 341; 149 Pa. St. 444; Betting *v.* Hobbett, 30 N. E. 1048; 142 Ill. 72; Speer *v.* Bishop, 24 O. S. 598, 602.
[9] Roberts *v.* Graham, *supra;* Johnson *v.* Avery, 41 Minn. 485; Waidner *v.* Pauley, 37 Ill. App. 278.

objections.[1] Indeed, objections because of a variance are waived unless made at the time the evidence is offered,[2] and so a variance which may be cured by an amendment is waived when no objection is made at the time of the admission of the evidence.[3] We are next concerned with the manner in which the objection because of variance shall be made. Under the code of one State whose provisions are the same as in Ohio, it is held that the remedy for a variance between the pleadings and proof is not by demurrer to the evidence, if the statute provides another remedy.[4] Under the Ohio code there appears to be an adequate remedy for raising objection to a variance which is material, by filing the prescribed affidavit showing that he has been misled and showing how he has been misled, discussed in a former section.[5] Where no affidavit has been filed the variance will be considered immaterial.[6] But the objections to be available must be made at the time the evidence is offered, and cannot be made by a general objection,[7] nor can the question of variance be raised under an objection to the competency or materiality of evidence.[8] And a motion to find for the defendant on the ground that the proof varies from the pleading is too general to save the objection.[9] The objection, therefore, must be made specially on the ground that the evidence varies from the pleadings and must specifically point out in what the variance consists.[10]

Sec. 756. Variance decided by whom in civil cases.—The question as to whether or not there is a variance between the pleadings and proof must be decided by the court,[11] though it has been held that in a doubtful case the question may be submitted to the jury under proper instructions.[12]

[1] Speer *v.* Bishop, 24 O. S. 598; Cummings *v.* Petsch, 41 Minn. 115. When trial is had without objections the proceedings will not be reversed on account of a variance which is not material within the meaning of the code, merely because there was no amendment. Hoffman *v.* Gordon, 15 O. S. 211, 218; Sibila *v.* Bahney, 34 O. S. 399. In the case of Bennett *v.* Judson, 21 N. Y. 238, the court says: "The allegation might have been made to conform to the proof, and where this might properly be done at the trial, it can be done even after judgment. This court in such cases never reverses a judgment, although the amendment has not actually been made."

[2] Foltz *v.* Hardin, 28 N. E. 786; 139 Ill. 405.

[3] Brown *v.* R. R. Co., 31 Mo. App. 661; Affd. in 99 Mo. 310.

[4] Wallick *v.* Morgan, 39 Mo. App. 469.

[5] *Ante*, secs. 724, 725, 728.

[6] Ridenhour *v.* K. C. Cable Ry. Co., 102 Mo. 270.

[7] Richards *v.* Bestor, 90 Ala. 352; O. & M. Ry *v.* Brown, 49 Ill. App. 40; Walsh *v.* Colclough, 56 Fed. 778.

[8] Merrick *v.* Hill, 28 N. Y. Supp. 237; Claflin *v.* Watch Co., 28 N. Y. Supp. 42; Burlington Ins. Co. *v.* Miller, 8 C. C. A. 612.

[9] L. S. & M. S. Ry. Co. *v.* Ward, 35 Ill. App. 423.

[10] State *v.* Moran, 27 Ill. App. 119.

[11] Birch *v.* Benton, 26 Mo. 153.

[12] Partridge *v.* Patterson, 6 Ia. 514.

Sec. 757. Variance decided by whom in criminal causes.—In criminal causes the statute makes it the duty of the court to decide whether a variance is or is not material.[1] The court must not, however, invade the province of the jury by deciding questions which should be decided by the jury. The court must point out by its charge to the jury how they will determine the variance. It may charge that upon a given state of facts, a charge in an indictment is or is not sustained.[2] For instance, if there be a variance claimed to exist in a name, the court should charge the jury that if they find, in a charge of homicide, that the deceased, Elisha B. Davidson, is the same person as Elisha Davidson intended to be charged by the grand jury under that name, that the variance is not material.[3]

The decision of the trial judge upon the materiality of a variance between an allegation of an indictment, and the evidence offered in its support, may be reversed, if erroneous and prejudicial.[4]

[1] R. S., sec. 7215. See also *ante*, sec. 751; Mead *v.* State, 26 O. S. 505.
[2] Stoughton *v.* State, 2 O. S. 563.
[3] Mead *v.* State, 26 O. S. 505.
[4] State *v.* Buechler, 57 O. S. 95.

CHAPTER XXXIV.

TAKING CASE FROM JURY.

SEC.
758. Introductory.
759. Withdrawing a juror.
760. Journal entry of the withdrawal of juror.
761. What cases may be taken from jury—Variance.
762. What cases may be taken from jury, continued.
763. Method of taking cases from jury.
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SEC. 758. Introductory.—The practice of taking a case from the jury is somewhat varied and obscure. The courts have not been perfectly clear and explicit in their decisions. The right of trial by jury is secured by the constitution and must be preserved in all cases where it exists. But before a party can insist that his case shall be submitted to the jury he must have one to submit. Not only must he have a good cause of action stated in his pleading, but he must also produce evidence which at least tends to prove his case. If his evidence fails in this respect, there is consequently nothing for the jury to decide, and the court may, by one of the methods designed for that purpose, take the case from the jury. It is a delicate duty, as there is danger of encroaching upon the province of the jury. But it is quite apparent that the exercise of this power is not an encroachment upon the constitutional right of trial by jury. The law in every case, in whatever form presented, belongs to the judge, and it is not only the right but his solemn duty to decide and apply it. He must determine the legal requisites to the right action, and the admissibility of the evidence offered to sustain it. When all the evidence offered by the plaintiff has been given, and a motion for a nonsuit is interposed, a question of law is presented whether the evidence tends to prove the facts involved in the right of action and put in issue by the pleadings.[1] What causes may be arrested from the jury and the method of doing it will be pointed out in this chapter. First the practice of the withdrawal of a juror will be considered.

[1] Ellis *v.* Ins. and Trust Co., 4 O. S. 628, 645.

Sec. 759. Withdrawing a juror.—As has been well said by one of the courts, the modern books are very barren of authority upon the question of the withdrawal of a juror. That such a practice prevails still, there is no doubt, though it is believed that it is somewhat different from the practice at its inception. A close study of the older English cases discloses that there was some conflict among them. The statement in Tidd's Practice is rather vague, namely: "A juror is frequently withdrawn at the recommendation of the judge where it is doubtful whether the action will lie, and in such cases the consequence is that each pays his own costs. The withdrawing of a juror, however, by consent of the parties, is no bar to a future action for the same cause."[1]

The object of the practice was to secure a discontinuance of the case after the jury had been impaneled, without working prejudice to the action. There is no way of accomplishing this purpose except by this method. There may be under our statute a voluntary dismissal,[2] but there has to be a new action commenced. By the withdrawal of a juror a continuance merely is the result.

When and for what reasons, therefore, may a juror be withdrawn, is the question, and herein lies the conflict.

Judge Swan said: "Sometimes the parties agree to withdraw a juror, the consequence of which is that the cause goes off as if no jury had been sworn, and without affecting the right of either party. In some of the circuits and in other States, the court exercises its discretion in allowing a juror to be withdrawn, even without the consent of the parties, instead of non-suiting the plaintiff for a defect in his proof, as in case of a surprise or mistake on his part in the preparation of the cause for trial. Where the defendant or his counsel have wilfully misled the plaintiff as to the nature of the defense, so that he comes unprepared to meet it, courts have, without the consent of the defendant, permitted a juror to be withdrawn; and they have done so even where the defendant has not wilfully misled the plaintiff."[3]

From what can be gathered from the early English cases, the right to permit a juror to be withdrawn seemed to depend, in both criminal and civil cases, more upon the consent of the parties than upon the authority of the court as a matter of discretion to grant the withdrawal of a juror. Or, we may say that in the cases decided, the consent of the parties had been given.[4]

[1] 2 Tidd, pp. 861–2.

[2] R. S., sec. 5314.

[3] Swan's (old Com. Law) Practice and Precedents, Vol. 2, pp. 901–2.

[4] By agreement. Dunman *v.* Bigg, 1 Campb. 269; Lipscombe *v.* Holmes, 2 Campb. 441; Sanderson *v.* Nestor, Ryan & Mood. 402; Everett *v.* Youells, 3 B. & A. 349; 3 Chitty's Pr., p. 917. C. J. Holt, in Chedwick *v.* Hughes. Carth.

In this country the authorities are very clear that the privilege of withdrawing a juror may be granted by the court within the sound discretion of the court, to prevent a failure of justice. This extends to all cases, civil and criminal, but should be exercised only in very extraordinary and striking circumstances.[1]

Sec. 760. Journal entry of the withdrawal of juror.—[*Caption.*] —This day came the parties by their attorneys, and also came the following named jurors, to wit; [*naming them*], who were duly empanneled and sworn according to law; and thereupon, by the consent of the parties, and with the assent of the court, [or] and the said A. B., plaintiff, having made application for the privilege of withdrawing a juror for the reason that [*assigning reason*], the court upon due consideration does sustain said application, and the said G. S., one of the jurors, is withdrawn. Whereupon it is ordered that the residue of said jurors be discharged, and the cause continued at the costs of——.[2]

Sec. 761. What cases may be taken from jury—Variance.—In deciding whether or not a case shall be taken from a jury, there must be nothing but a pure question of law presented for determination. There are, as elsewhere shown,[3] two kinds of variances—material and immaterial. In the common law practice if the proofs did not sustain the material allegations, the jury were bound to find the issue against the plaintiff.[4] So under the present practice, where there is only a variance between proof and allegations, it does not warrant the court in arrest-

465, said that it was the opinion of all the judges of England, upon debate between them, that in civil cases this cannot be done without the consent of all parties; nor without defendant's consent in criminal cases not capital. The statement was severely criticised later in a case in Foster, 36, 37.

[1] U. S. *v.* Coolidge, 2 Gallison, 363; in cases of surprise. Messenger *v.* Bank, 48 How. Pr. 542. Surprise or mistake in preparation of cause for trial. People *v.* Judges, 8 Cowen, 127. Where party labors under misapprehension as to his testimony and is unprepared to introduce his evidence. Dillon *v.* Crockcroft, 90 N. Y. 649. By public prosecution in misdemeanors. People *v.* Ellis, 15 Wend. 371. See also very full case by Kent, J., People *v.* Olcott, 2 John. Cas. 301.

Walker's Am. Law. p. 702, (10 Ed.) says: "A non-suit did not at common law hinder him from commencing another action for the same cause, but under the code it is a judgment on the merits. (24 O. S. 83.) There is, however, an arrangement, by which both consequences may be avoided, and the cause continued in court; and that is, by withdrawing a juror; which by preventing the possibility of a verdict, places the cause back in the same condition as before the trial commenced. It is, of course, a matter of compromise with the parties, under leave of court." If the opposite party should object to the withdrawal of a juror, as would be the case most likely, it is probable that under the authorities that the court would in the exercise of its discretion grant the privilege.

A juror was withdrawn in trial court in Francisco *v.* Ryan, 54 O. S. 307, 311, by consent of parties.

[2] See entry in 54 O. S. 311.

[3] *Ante*, secs. 724, 726.

[4] *Ante*, sec. 722.

ing the case from the jury, but it must be submitted to the jury if the evidence *tends* to prove the case. Objections to the evidence must, as matter of course, be taken at the time of its introduction.[1] If the variance is deemed material, the party may show by proper method[2] that he has actually been misled. This objection may very appropriately be made at the close of the evidence, so that in case an amendment is allowed which works a surprise, a continuance may be asked. If the party does not take leave to amend there would be nothing remaining for the court but to direct a non-suit.[3] If it is a total failure of proof,[4] a non-suit should be directed.

Sec. 762. What cases may be taken from jury, continued.—If, after the plaintiff has introduced all of his evidence and rested, and if it appears that the evidence fails to authorize a judgment upon the cause of action pleaded and has not produced sufficient evidence to entitle him to go to the jury, a non-suit should be ordered upon motion.[5] In a former chapter[6] the mode of taking a cause from the jury was fully discussed. The rule prevailing in some jurisdictions that a non-suit may be granted where the court would feel called upon to set the verdict aside on the ground that it is contrary to the evidence[7] does not prevail in Ohio. On the contrary, the rule is adopted that if there is some evidence which tends to prove all the facts which it is incumbent on the plaintiff to establish in order to maintain the action, he has a right to have the weight and sufficiency passed upon by the jury.[8] It is only where there is a total failure of proof, a total absence of proof upon some one or more of the material averments in the petition, of the facts necessary to be established, that the court is authorized to direct a verdict for the defend-

[1] Boyce *v.* C. & S. Co., 25 Cal. 460.

[2] *Ante*, sec. 725.

[3] Thompson on Trials, sec. 2251, and cases cited.

[4] *Ante*, sec. 728.

[5] Palmer *v.* Chicago, &c., Ry. Co., 112 Ind. 250.

[6] *Ante*, sec. 652, ch. Instructions to Jury.

[7] Elliott's Gen. Pr., sec. 878.

[8] Ellis *v.* Ins. & Trust Co., 4 O. S. 628, 645; Stockstill *v.* R. R. Co., 24 O. S. 83; Byrd *v.* Blessing, 11 O. S. 362; Wagner *v.* Ziegler, 44 O. S. 59; Dick *v.* R. R. Co., 38 O. S. 389; Horne *v.* Lumber Co., 52 Kan. 617; The Powell Tool Co. *v.* Donald, 13 W. L. B. 64 (Sup. Ct. Conn.)

This is the "Scintilla" rule possibly adopted by other courts: "That where there is *any* evidence, however slight, *tending* to support a material issue, the case must go to the jury, since they are the exclusive judges of the weight of evidence." Thompson on Trials, sec. 2246, and numerous cases cited This rule is adopted in guarding strictly the right of trial by jury. Judge Elliott (Elliott's Gr. Pr., sec. 878) (note) says: "But the weight of both reason and authority is in favor of the rule as we have stated above (where the evidence was such that the court would be warranted in setting the verdict aside), for it is absurd to submit a cause to the jury, where there can be but one verdict that the court will allow to stand." It must be admitted that there is wisdom in this. See Thompson on Trials, sec. 2248.

ant;[1] or where the evidence is such as to show no cause of action on the part of the plaintiff.[2] The court is not authorized in considering a motion to direct a verdict, to weigh the evidence; this would be doing what is required of the jury; if there is evidence tending to sustain the plaintiff's case, on all points, no matter how slight, the case must be submitted to the jury; and, for the purpose of the motion, everything is admitted which the evidence in any degree tends to prove, and this involves and includes every conclusion which a jury might fairly or reasonably deduce from the evidence.[3]

If the facts are disputed or uncertain, the testimony conflicting or contradictory, or the proper inference to be drawn therefrom doubtful, or a material fact is in doubt, the case must be submitted to the jury.[4] Where there is no conflict in the evidence as to the material facts, and the law admits of no inference from the evidence except that favorable to the one side, a verdict may be directed.[5] Where there is no evidence tending to prove the facts alleged by the person having the burden of proof a non-suit is proper. It is a failure of proof.[6] A direction may be made also, where the plaintiff on the pleadings is entitled to recover, and there has been no evidence offered by the defendant tending to disprove the same.[7] In some cases where it appears during the progress of the trial that the action will not lie, although the objection appears in the record, and might be taken advantage of by motion in arrest of judgment, the court may direct a non-suit.[8]

Sec. 763. Method of taking case from jury.—There is a lack of uniformity in different jurisdictions as to the mode of taking a case from the jury, when there is a material variance without amendment, or a failure of proof, or where the plaintiff fails to introduce any evidence tending to prove his case. The common-law method was by a demurrer to the evidence. In some States the demurrer has been superseded by a motion at the close of the evidence to direct a verdict, or for a non-suit. A motion for a non-suit is more strictly correct than for direction of a verdict, as it calls for action of the court upon the proofs where it is claimed that there is a failure of proof. The motion is sometimes made to arrest the testimony from the jury, and for

[1] Clark *v.* Stitt, 12 O. C. C. 759; Miller *v.* Armleder, 4 O. N. P. 234.

[2] Miller *v.* Armleder, *supra.*

[3] Stewart *v.* Toledo Bridge Co., 15 O. C. C. 601.

[4] Railroad Co. *v.* Crawford, 24 O. S. 631; Kelly *v.* Hanibal, &c., R. R. Co., 70 Mo. 604, 608; Rickey *v.* Burns, 83 Mo. 362, 364; Boyd *v.* Cross, 33 S. W. 1093 (Tex.).

[5] Roots *v.* Kilbreth, 18 W. L. B. 58.

[6] Wagner *v.* Ziegler, 44 O. S. 59; Thompson on Trials, sec. 2245, and cases.

[7] Whelan *v.* Kinsley, 26 O. S. 131.

[8] Powell *v.* Jones, 12 O. 35.

judgment for the defendant. A direction of a verdict will also serve the purpose of relieving the jury from a consideration of the case. There is in fact no real difference in the methods, as they all work out practically the same results.

The method is more accurately stated in the chapter on Instructions to Jury.[1]

Sec. 764. Of the demurrer to the evidence.—A demurrer to the evidence was a common-law method of obtaining a compulsory non-suit. It was a proceeding by which the court was called upon to declare what the law was upon facts shown in evidence, operating similarly to a demurrer to a pleading. Judge Elliott says: "The party who demurs to the evidence presents a written pleading wherein the evidence is embodied and avers that it is insufficient to entitle the party against whose evidence it is addressed to a recovery."[2] It admits the truth of the evidence as well as all reasonable inferences that may be drawn.[3] There was a joinder in the demurrer by the opposing party similar to a joinder in demurrer to pleading. The filing of a demurrer and joinder therein operates to completely withdraw the case from the jury, leaving it entirely for decision by the court. As to the effect of the overruling of the demurrer upon the right of the demurrant to introduce his evidence there is some conflict. As the question is not of so much importance to the Ohio practitioner, the result of Judge Elliott's investigation and personal views are given. He is of the opinion from the authorities which he has collected that there is an election by the demurrant that precludes the parties; that the parties cannot as a matter of right have the case go to the jury, and that if he introduces his evidence he waives all objections to the overruling of the demurrer.[4] The practice of demurring to the evidence does not prevail in Ohio, and evidently did not prior to the adoption of the code. Judge Swan, in his earlier work on common-law practice, treats demurrer to the evidence as though it were practiced. Judge Ranney in *Ellis v. Ohio Life and Trust Co.*,[5] a case under the old procedure, stated that our decisions have rather limited than extended the power to order a non-suit, and that our State had somewhat enlarged the practice of ordering involuntary non-suits, as compared with the English courts and those of other States of the Union; that it was

[1] *Ante*, secs. 652, 653.

[2] Elliott's Gen. Pr., sec. 856. The evidence must be embodied in the demurrer. 1 Saunders' Plg. and Ev., 1102, 1103; 2 Tidd's Pr. 861; 4 Chitty's Gen. Pr. 15, 16.

[3] Bulkeley *v.* Butler, 2 B. & C. 434; Pawling *v.* United States, 4 Cranch, 219.

[4] Elliott's Gen. Pr., sec. 865, citing German Ins. Co. *v.* Frederick, 58 Fed. 144; Joliet Steel Co. *v.* Shields, 134 Ill. 209, and other cases.

[5] 4 O. S. 644, 645.

done as a matter of practical convenience by substituting the motion for a non-suit for the demurrer to the evidence.[1]

Sec. 765. The practice in Ohio.—It has been claimed that the code[2] only authorizes the court to dismiss an action, without prejudice to a future action, by the plaintiff before the final submission of the case to the jury, by the court where the plaintiff fails to appear on trial, for want of necessary parties. That as it is provided by that section of the code that: "In all other cases the decision must be upon the merits, upon the trial of the action," a non-suit could not be ordered because it was not upon the merits of the case, and yet amounted to a dismissal. It has been held that prior to the passage and taking effect of the code of civil procedure,[3] a court had the right in a proper case, to direct a non-suit. Under the code the court is authorized in a proper case to arrest the testimony from the jury, or, to direct a non-suit and render judgment for the defendant. The judgment in such case, however, has not the effect of a non-suit at common law, but is a decision upon the merits. It is substantially the same as a judgment for the defendant on a demurrer to the plaintiff's evidence at common law, or the submission of the case to the jury under instructions to return a verdict for the defendant, the same result being reached in either case.[4]

Arresting a case from the jury and rendering judgment is not different from a motion to direct a non-suit, both of which courses are pursued in practice, and are proper.[5] The Ohio

[1] Mr. Thompson says: "The demurrer to evidence, used in the ancient common law practice, seems to have passed, for the most part, out of use in American jurisdictions. In place of it, the defendant moves for a non-suit, or requests the court to give peremptory instructions to the jury to return a verdict for the defendant. In either case, the effect is the same as a demurrer to the evidence under the ancient practice, &c. . . . The sole object of such a demurrer or motion is to present the case to the judge that he shall determine what inferences of law are to be drawn from the facts which the evidence tends to prove. It is, therefore, analogous to a demurrer to a pleading which admits all the facts to be true which are yet pleaded." Thompson, sec. 2267.

[2] Sec. 5314.

[3] R. S., sec. 5301.

[4] Stockstill *v.* R. R. Co., 24 O. S. 83. See *ante*, secs. 652, 653, where this matter is more fully explained.

[5] In Byrd *v.* Blessing, 11 O. S. 362, a motion to direct a non-suit was made and sustained. In Dick *v.* R. R. Co., 38 O. S. 389, after the plaintiff had adduced testimony and rested, the court on motion of defendant arrested the testimony from the jury, and entered judgment in favor of defendant. In Wagner *v.* Ziegler, 44 O. S. 59, a direction of verdict was made. In Stegeman *v.* Humbers, 2 O. C. C. 51, a motion to arrest the evidence from the jury, and render judgment, was made at the close of plaintiff's evidence.

The practice of ordering a non-suit "if sanctioned nowhere else," says Wood, Judge, "is almost the necessary consequence of our system. It frequently saves a wasteful consumption of time, which would be occupied in fruitless litigation, and prevent the disposition of other business." Powell *v.* Jones, 12 O. 35.

code[1] expressly recognizes both motion to direct a non-suit, and a motion to arrest the testimony from the jury, and either is therefore proper.

Sec. 766. May the defendant introduce evidence after making the motion.—Judge Elliott[2] argues strenuously that under the practice of demurring to the evidence, where there is a joinder in the demurrer, the case has been completely withdrawn from the jury, and that there is an election which concludes the parties; that the parties have not the right to have the case resubmitted to the jury after the demurrer is overruled. He says, however, that for cause the court may permit the case to go to the jury; that as a matter of right a demand to go to the jury cannot be made. This hardly seems in harmony with the view that it is similar to the demurrer to the pleading, as that is an admission only for the purpose of argument, and there is no waiver of the right to further plead.

At any rate, as a motion for a non-suit, or to arrest the testimony from the jury has taken the place of the demurrer, it may not involve the question of waiver, although it does involve the same principle of admission.

Sec. 767. Effect of introduction of evidence after motion for non-suit overruled.—Such a motion involves an admission of all facts which the evidence in any degree tends to prove; and if there is any evidence the motion must be denied.[3] And here arises a question of some difficulty and obscurity, as to what effect the admission has upon the party making the motion, and upon his right to subsequently introduce evidence. Must the defendant who makes a motion for a non-suit or to arrest the testimony stand or fall by the same? Or, if he does proceed to introduce evidence, does he waive error in the court overruling the motion? There are many authorities to the effect that where a *demurrer to the evidence* has been overruled and the party introduces his evidence, he waives error in the ruling on the demurrer.[4] There is likewise a large array of cases to the effect that where a *motion for a non-suit* is overruled the defendant waives error therein where he proceeds with the introduction of his evidence.[5]

[1] Whittaker's, sec. 5301.

[2] Elliott's Gen. Pr., sec. 865.

[3] Ellis *v.* Life Ins. Co., 4 O. S. 628; Snell *v.* Con. St. Ry., 9 O. C. C. 348.

[4] German Ins. Co. *v.* Frederick, 58 Fed. 144; Joliet Steel Co. *v.* Shields, 134 Ill. 209; Railroad Co. *v.* Hawthorne, 144 U. S. 202; Alexandria *v.* Stabler, 4 C. C. A. 324; Bradley *v.* Poole, 98 Mass. 169.

[5] Denver & R. G. R. Co. *v.* Robinson, 40 Pac. 840; 6 Col. App. 432; Kerr *v.* Cusenbary, 1 Mo. App. 237, American Cent. Ins. Co. *v.* Heiserman, 67 Fed. 947; Bell *v.* Sheridan, 21 D. C. 370; Tatlen *v.* Burhans, 61 N. W. 58;

On the other hand another line of decisions take a contrary view that where the defendant puts in his evidence, he does not waive his objection to the action of the court in overruling the demurrer to the evidence, and that a reviewing court will consider the error.[1] Still another line of precedents hold that where a party, on the overruling of the demurrer or motion for non-suit, introduces his own testimony he takes the risk of aiding the plaintiff and supplying his evidence ; that if his own evidence does not in fact aid the plaintiff, he can renew his demurrer or motion at the close of the entire evidence.[2] The question, it seems, may really be determined without regard to a question of waiver of error. A motion for non-suit or to arrest the testimony can only be made and entertained when there is *no* evidence *tending* to support the plaintiff's claim. Therefore, if the defendant proceeds after his motion has been overruled with the introduction of his evidence, and does not bring forth testimony which will make out the plaintiff's case, when he makes a motion for a new trial he can insist that the verdict is not sustained by any evidence. A court of error in considering the question will set aside the verdict where there is *no* evidence *tending* to support the plaintiff, or as the statute authorizing the granting of a new trial when there is not sufficient evidence to sustain the verdict.[3]

Sec. 768. May direct verdict for defendant when.—After all the evidence of both sides is in, and there is no conflict in the evidence as to the material facts of the case, and the law admits of no inference from the evidence except that which is favorable to the defendant, the court may direct a verdict for the defendant.[4]

103 Mich. 6; Lake S. & M. S. Ry. *v.* Richards, 152 Ill. 59; Western U. Tel. Co. *v.* Thorn, 64 Fed. 287; Railway Co. *v.* Velie, 140 Ill. 59; Wrecking Co. *v.* Dandelin, 143 Ill. 409; State Trust Co. *v.* Paper Co., 162 Mass. 156; Thompson *v.* Avery, 39 Pac. 829; 11 Utah 214; Poling *v.* Ohio River R. Co., 38 W. Va. 645; Core *v.* Ohio River R. Co., 38 W. Va. 456; Bogk *v.* Gassert, 149 U. S. 17; Weil *v.* Nevitt, 31 Pac 487; 18 Col. 10.

[1] Weber *v.* Kansas City Cable Co., 100 Mo. 194; McPherson *v.* St. Louis Ry. Co., 97 Mo. 253. In Bassenhorst *v.* Wilby, 45 O. S. 333, evidence was introduced after motion was overruled, and the same motion was made at the close of the evidence, and the reviewing court considered the action of the court upon the motion, and reversed the judgment.

[2] Felix *v.* Bevington, 52 Mo. App. 403; Matson *v.* Port Townsend So. R. Co., 9 Wash. 449; Gaylord *v.* Gallagher, 20 N. Y. S. 682; Carroll *v.* O'Shea, 21 N. Y. S. 956. See Schenectady, &c., R. Co. *v.* Thatcher, 11 N. Y. 102; Kent *v.* Harcourt, 33 Barb. 491; Calvin *v.* Burnet, 2 Hill, 620; Dean *v.* Corbett, 51 N. Y. Super. 103

A non-suit may be asked for at any time before verdict or judgment. Summer *v.* Kelly, 17 S. E. 364.

[3] Hacker *v.* Brown, 81 Mo. 68; Foster *v.* Foster, 77 Mo. 227; Cone *v.* Railroad Co., 38 W. Va. 456.

[4] Roots *v.* Kilbreth, 18 W. L. B. 58 (Peck, J., superior court, 1887). See Baylis *v.* Travelers Ins. Co., 113 U. S. 316; Snell *v.* Consolidated St. Ry., 9 O. C. C. 348.

Sec. 769. Objections and saving exceptions to ruling of court.—Exceptions must be taken to the action of the court upon the motion, and the evidence taken before the reviewing court to authorize the latter court to consider the action of the court. The general rule is that a bill of exceptions must show that it contains all the evidence, but whether this rule is applicable to the reviewal of a decision of the court upon motion for a non-suit has been questioned. A reviewing court cannot properly decide whether a verdict is against the evidence unless the bill of exceptions affirmatively shows that it contains all the evidence. There is, however, no such question before the court in a motion for a non-suit or to arrest the testimony from the jury. Such motion involves an admission of all the facts which the evidence tends to prove, and presents a question of law for the court. And the only question with reference to the evidence which the court must consider, is, whether there is *any* evidence *tending* to prove the facts alleged in the petition.[1]

Upon a motion for a non-suit the trial court is not authorized to weigh the evidence.[2]

Sec. 770. The practice in criminal cases.—Chief Justice Welch, in *Baker v. State*,[3] said: "With regard to the practice of demurring to the evidence, I will only say that it does not seem to be provided for or sanctioned by the criminal code. In such cases instead of demurring, I think the better practice is to move the court to exclude the evidence or to instruct the jury that it is insufficient. In the present case we consider the demurrer as equivalent to such a motion, and the overruling of the demurrer as equivalent to overruling the motion."

In one State the courts apply the same rule to civil and criminal cases, that where there is not a scintilla of evidence against the defendant, a verdict will not be sustained.[4] The practice of directing a verdict is as proper in a criminal case as in civil cases, and is probably generally followed.[5]

[1] Dick *v.* Railroad, 38 O. S. 389; Mack *v.* Gt. Western Despatch, 3 O. C. C. 36, 40 (as to exceptions). In the last case the circuit court held that the bill of exceptions need not show that it contained all the evidence, and that Wagers *v.* Dickey, 17 O. 439, did not hold a different rule. In the latter case, it was held that the supreme court will not reverse for error in refusing to grant a non-suit, unless the bill of exceptions discloses all the testimony which was before the court on the motion for non-suit. In the circuit court case, however, the motion for non-suit was sustained, while in the 17 Ohio, 493, the motion was refused.

[2] Stewart *v.* Bridge Co., 15 O. C. C. 601.

[3] 31 O. S. 314, 317.

[4] Commonwealth *v.* Hollis, 170 Mass. 433.

[5] State *v.* Kyne, 86 Ia. 616; Commonwealth *v.* Merrill, 14 Gray, 415.

Sec. 771. Motion for new trial may be made when case arrested from jury.—Where on the trial of an action a motion by the defendant to arrest the case from the jury is sustained and the jury is discharged and judgment is rendered for the defendant, the plaintiff may make such action the subject of a motion for a new trial.[1]

[1] Weaver *v.* C. S. & H. V. Ry., 55 O. S. 491.

CHAPTER XXXV.

NEW TRIAL.

SEC.
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SEC. 772. New trial defined, and objects.—A new trial is a re-examination, in the same court, of an issue of fact, after a verdict by a jury, a report of a referee or master, or a decision of a court; and the former verdict, report or decision will be vacated and a new trial granted on the application of the party aggrieved.[1] The purpose of the new trial is the correction of any errors or other prejudicial matters occurring during the trial.[2] The complaining party must exhaust his remedy in the trial court by filing his motion before he can ask a reviewing court to consider the errors of which he complains. The court of last resort will not review alleged errors by petition in error until a ruling has been obtained upon the motion[3] and an exception taken thereto.[4] A new trial should not be granted upon mere technical grounds where substantial justice has been done.[5] The motion is addressed to the sound discretion of the court, and where a new trial is allowed the judgment so rendered cannot be reversed for error in such allowance.[6]

SEC. 773. Motion for new trial when necessary.—The code does not expressly provide when a motion for a new trial is or is not necessary. The question is one of judicial interpretation and construction of a number of statutory provisions, as well as of

[1] O. Code, sec. 5305.

[2] Seifrath *v.* State. 35 Ark. 412.

[3] Jones *v.* Hayes, 36 Neb. 526; Smith *v.* Spaulding, 34 Neb. 128; Brown *v.* Coal Co., 48 O. S. 542; 34 O. S. 128.

[4] Foster *v.* Robinson, 6 O. S. 94.

[5] Buck *v.* Waddle, 1 O. 357; Bush *v.* Critchfield, 5 O. 109.

[6] Conrad *v.* Runnels, 23 O. S. 601; Smith *v.* Board, 27 O S. 44; Jaspers *v.* Mallon, 11 W. L. B. 166.

a consideration of common-law principles. The statute prescribes eight grounds for making the motion, and it is perfectly apparent that all of these grounds will not appear upon what we understand by the face of the record, viz.: the pleadings and journal entries. It is said that courts have not determined whether a motion for a new trial is necessary upon a number of grounds.[1] But it is perfectly apparent upon a careful consideration of our practice and the provisions of the code that a motion for a new trial is necessary to bring the matters complained of before the court again upon the action of the court and any other evidence, affidavits and depositions, possibly bringing forward something which has occurred since the trial, and bringing all of the matters complained of upon the record. All the testimony, instructions of the court and occurrences of the trial are brought upon the record by means of a bill of exceptions. The purpose of the motion for a new trial is to bring these matters upon the record and to resubmit the questions to the court, and the error is thereupon predicated upon the action of the court upon the motion for a new trial. The code especially provides that when the decision is not entered on the record, or the grounds of the objection do not sufficiently appear in the entry, or where the exception is to the decision of the court upon various matters during the trial, the exceptions must be reduced to writing.[2] It is said that a motion for a new trial, and an exception to that decision, are indispensable prerequisites to the signing of a bill of exceptions; a motion to set aside the verdict of a jury, or the finding of facts by the court, overruled by the court and an exception taken are necessary to lay a foundation for error.[3] This general rule ought to govern all cases and aid in determining when a new trial is necessary.

A motion for new trial is unnecessary where the error complained of is upon some question of law as shown upon the face of the pleadings, in which case an exception to the ruling of the court only is essential. So a motion is unnecessary where an agreed case is submitted to the court,[4] or where the court refuses to vacate an order appointing a receiver;[5] or where there is error in the pleading;[6] or where the judgment is rendered upon demurrer.[7]

A motion for a new trial is necessary where the court upon motion of the defendant, arrests the evidence of plaintiff from

[1] Weaver *v.* R. R. Co., 55 O. S. 494.
[2] Code, sec. 5301.
[3] Ide *v.* Churchill, 14 O. S. 372; Everett *v.* Sumner, 32 O. S. 562.
[4] Brown *v.* Mott, 22 O. S. 149.
[5] Mercantile Trust Co. *v.* Iron Works, 4 O. C. C. 580.
[6] State *v.* Phares, 24 W. Va. 657, 662.
[7] Rogers *v.* Rogers, 78 Ga. 688.

the jury, and discharges the jury and renders judgment for the defendant.[1] And where it is sought to review an order of the trial court in setting aside the settlement of a cause pending, heard upon evidence, a motion for a new trial is necessary, and upon error should be accompanied by a bill of exceptions containing the evidence.[2]

Sec. 774. For irregularity in proceedings.—A new trial may be granted for "irregularity in the proceedings of the court, jury, referee, master or prevailing party," or any order of the court or referee, by which the party was prevented from having a fair trial.[3] The irregularity or misconduct must have affected the judgment or improperly influenced the verdict.[4]

Examples of irregularity or misconduct which have been held not prejudicial are found in the reports as follows: Improperly sending papers to the jury, in the absence of fraudulent intent;[5] or where the judge sends them a copy of the statutes, in the absence of the parties, calling their attention to certain sections relating to the case;[6] or where the jury are permitted to take papers not in the case, it appearing that there is no prejudice to any one;[7] and so with irregularities in the selection;[8] or impaneling;[9] or swearing of a jury.[10]

It is a prejudicial irregularity to permit counsel to comment upon matter not in evidence nor relevant to the issue if prejudicial to the party.[11] And so with a judgment taken upon a warrant of attorney without filing the original warrant with the petition.[12]

Sec. 775. For abuse of discretion.—The statute makes "abuse of discretion by which the party was prevented from having a fair trial," ground for new trial and error.[13] It is well understood that there can never be any complaint as to acts which are discretionary, unless there has been an abuse. There is no standard or rule by which to determine whether or not discretion has been abused except the opinion of judges according to the circumstances of the case. A judgment will not be reversed unless there has been a clear abuse.[14]

[1] Weaver *v.* C. S. & H. Ry. Co., 55 O. S. 491.

[2] Snyder *v.* Wanamaker, 17 O. C. C. 184.

[3] Code, sec. 5305.

[4] Armleder *v.* Lieberman, 33 O. S. 77.

[5] Tracy *v.* Card, 2 O. S. 431; Neff *v.* Cincinnati, 32 O. S. 215. It must have been sent through some trick. Maynard *v.* Fellows, 43 N. H. 259.

[6] Gondolfo *v.* State, 11 O. S. 114.

[7] Jaspers *v.* Mallon, 11 W. L. B. 166.

[8] Page *v.* Danvers, 7 Met. 326.

[9] Ferris *v.* People, 35 N. Y. 125.

[10] State *v.* Jones, 5 Ala. 666.

[11] Union Central L. Ins. Co. *v.* Cheever, 36 O. S. 201.

[12] Bank *v.* Doty, 9 O. S. 506.

[13] Code, sec. 5305.

[14] Nooney *v.* Mahoney, 30 Cal. 226.

Sec. 776. For misconduct of jury or prevailing party.—Any misconduct of the jury or prevailing party which affects the substantial rights of the unsuccessful party is the second ground for a new trial.[1] For example, the separation of a juror after a case has been submitted, for the purpose of drinking,[2] or conversation with others, after their retirement, in regard to the case,[3] will, unless satisfactorily explained, be ground for new trial. The presence of an officer in the jury-room is not necessarily a cause for new trial, but it will depend upon circumstances.[4] Jurors should not make disclosures of any personal knowledge they may have, contradicting persons who testified in the jury-room, as it will be misconduct warranting the setting aside of the verdict.[5] A new trial has been granted where the officers in charge of the jury talked of the case in such a way as to influence them.[6] It is misconduct warranting a new trial for a defendant to talk to a jury about the case while viewing the premises, or to treat them to beer and cigars after they have made the view.[7] Any attempt on the part of the prevailing party or his attorney to corrupt a juror, even though unsuccessful, is ground for a new trial.[8] What constitutes misconduct of a jury is discussed in a former chapter.[9]

Sec. 777. For accident or surprise.—Accident or surprise, which ordinary prudence could not have guarded against, is a third cause for a new trial.[10] Motions founded upon this ground are addressed to the sound discretion of the court.[11] To warrant the granting of a new trial upon this ground, it is incumbent on the applicant to show accident or surprise in reference to a material matter, which could not be avoided by ordinary prudence, and that it actually produced an injury.[12] It cannot be granted for error or neglect of counsel,[13] or because, by being misled by a misapprehension of the law, he abstained from offering pertinent

[1] O. Code, sec. 5305.

[2] Weis *v.* State, 22 O. S. 486; Wright *v.* Burchfeld, 3 O. 53. See Hilliard's New Trials, p. 199, secs. 2*a*, 3, 4, etc. It is immaterial if a juror drank during progress of trial if this did not influence the result. Railroad Co. *v.* Porter, 32 O. S. 328. See State *v.* Boley, 17 Ia. 39.

[3] Farrer *v.* State, 2 O. S. 54. See Sutliff *v.* Gilbert, 8 O. 405; 11 W. L. B. 278; Knight *v.* Freeport, 13 Mass. 218.

[4] See article in 11 W. L. B. 278, and cases cited; Hilliard on New Trials, sec. 25, p. 169.

[5] Kent *v.* State, 42 O. S. 426. See Lawrence *v.* Collier, 1 Cal. 37.

[6] Nelms *v.* State, 13 S. & M. 500.

[7] Bender *v.* Buehrer, 1 Toledo Legal News, 91 (Lucas Co. C. C. 1894).

[8] Railroad *v.* Porter, 32 O. S. 328.

[9] *Ante*, ch. 28.

[10] O. Code, sec. 5305.

[11] Isham *v.* Fox, 7 O. S. 320; Coleman *v.* State, 20 Ark. 53; Todd *v.* State, 25 Ind. 212.

[12] Chicago & G. E. Ry. Co. *v.* Vosburgh, 45 Ill. 311; How *v.* Bodman, 1 Disn. 115; Endress *v.* Nelp, 1 Disn. 411.

[13] How *v.* Bodman, *supra;* Endress *v.* Nelp, *supra;* Barrow *v.* Jones, 1 J. J. Marsh. 470; Dame *v.* Dame, 38 N. H. 429, 434; Handy *v.* Davis, 38 N. H. 411.

testimony.[1] Failure to receive notice of trial is not such an accident as will warrant the granting of a new trial, where it was occasioned by the party's own neglect.[2] But where parties have negotiations for settlement pending, and a cause is set down without their knowledge, and judgment rendered thereon, it will be set aside.[3] Cases may arise where a party is surprised by his own witness, who has been duly summoned, absenting himself,[4] or where counsel are led to believe that a certain witness of his adversary is not to be present. But the fact that the unsuccessful party is surprised at the testimony of his adversary's witness is not ground for a new trial. Surprise to a party, arising from the unexpected statements of a witness who has been twice examined in the case, is not ground for a new trial where substantial justice is done.[5] It is essential that the party surprised make the necessary objection at the time, as it may be that the matter can be remedied during the trial, or that the trial may be continued.[6] The motion upon this ground must clearly assign the nature of the accident or surprise, and be accompanied by affidavits showing the merits.

Sec. 778. For excessive damages.—A new trial should be granted where excessive damages, appearing to have been given under the influence of passion or prejudice, have been awarded.[7] The amount must be so large as to evince prejudice, partiality or corruption.[8] While courts move with great caution in setting aside verdicts, especially on account of excessive damages, yet where they are obviously exorbitant there should be no hesitation;[9] and where in such cases a new trial has been refused, the judgment will be reversed unless a *remittitur* be entered for the excess.[10] The court may in fact make *remittitur* of the excess the condition of refusing a new trial, which will not be held to be error.[11]

Sec. 779. For error in assessment of recovery.—A new trial will be granted where there has been "error in the assessment

[1] Ferguson *v.* Gilbert, 16 O. S. 88.

[2] Griffin *v.* O'Neil, 47 Kan. 116; 27 Pac. Rep. 826.

[3] Mitchell *v.* Knight, 7 O. C. C. 204.

[4] Pilot, &c., Co. *v.* Chapman, 11 Cal. 161.

[5] Stites *v.* McKibben, 2 O. S. 588.

[6] Wait *v.* Maxwell, 5 Pick. 217; Jackson *v.* Davis, 5 Cow. 123.

[7] O. Code, sec. 5305.

[8] Simpson *v.* Pitman, 13 O. 365; Fisher *v.* Patterson, 14 O. 418.

[9] Railway Co. *v.* Slusser, 19 O. S. 157.

[10] Lear *v.* McMillan, 17 O. S. 464.

[11] Pendleton St. R. Co. *v.* Rahmann, 22 O. S. 446; Douglas *v.* Day, 28 O. S. 175; Durrell *v.* Carver, 9 O. S. 72; Durrell *v.* Boyd, 2 Disney, 463; Ryan *v.* Sayen, 1 Toledo Legal News, 264. A verdict for personal injuries should not be set aside unless the jury abused its discretion. Schneider *v.* Hosier, 21 O. S. 98. See discussion of this subject, *ante*, sec. 711.

of the amount of recovery, whether too large or too small, when the action is upon contract, or for the injury or detention of property."[1] Where judgment has been rendered for a larger sum than was due, the error may be corrected by remitting the excess, even after the petition in error has been filed.[2]

Sec. 780. When verdict or judgment contrary to evidence and law.—A new trial may be had where the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law.[3] The same court cannot grant more than one new trial on the weight of evidence against the same party in the same case.[4] This is one of the grounds most commonly adopted, and embraces the verdict of the jury, report of the master or referee, and the decision of the court without the intervention of a jury. And yet there is danger of conflict between court and jury; and unless courts rigidly refrain from interfering with the verdict unless manifestly against the evidence,[5] they will usurp the functions of the latter. Courts should therefore rarely undertake to decide upon the weight or effect of evidence, and should do so only where the verdict is clearly wrong, and not when there is a mere difference of opinion.[6] A new trial should be granted where it is clear that material, uncontradicted evidence has been disregarded which would have required a different verdict. A decision or finding of the court is entitled to the same consideration as a verdict, and will not be set aside unless clearly erroneous.[7] Neither finding of court or jury can be reviewed on error upon the ground that it is against the evidence, unless there has been a motion for a new trial which has been overruled and an exception taken.[8] A judgment of an intermediate reviewing court, reversing the trial court in overruling a motion for a new trial and remanding the cause, will not be disturbed where it appears that the evidence was conflicting as to a material point in issue.[9]

Sec. 781. For newly-discovered evidence.—Newly-discovered evidence, material to the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, is ground for a new trial.[10] It is said that motions of this

[1] O. Code, sec. 5305.
[2] Doty *v.* Rigour, 9 O. S. 526.
[3] O. Code, sec. 5305.
[4] R. S., sec. 5306, Amended 93 O. L. 217.
[5] Breese *v.* State, 12 O. S. 146.
[6] McGatrick *v.* Wason, 4 O. S. 566; Remington *v.* Harrington, 8 O. 507; French *v.* Millard, 2 O. S. 53; Abernethy *v.* Bank, 5 O. S. 266.
[7] Merrick *v.* Boury, 4 O. S. 60; Insurance Co. *v.* Bollmeyer, 5 O. S. 107.
[8] Westfall *v.* Dungan, 14 O. S. 276; Ide *v.* Churchill, 14 O. S. 372; Turner *v.* Turner, 17 O. S. 449; Randall *v.* Turner, 17 O. S. 262; Kepner *v.* Snively, 19 O. 296.
[9] Woolen Mills Co. *v.* Titus, 35 O. S. 253.
[10] O. Code, sec. 5305.

character should be scrutinized very closely. After the trial of a case it is a very easy matter to discover new evidence and to see what ought to have been. The evidence should be of the most satisfactory character.[1] Motions upon this ground therefore rest in the discretion of the court, and cannot be reviewed unless there has been abuse of discretion.[2] And yet the code offers ample opportunity to the complainant, by extending the time within which a motion may be made upon this ground.[3] But the mover must have been vigilant in discovering evidence before the trial ceases, as the law does not encourage the granting of new trials except for substantial reasons.[4] There are certain well-defined rules governing motions made under this head. The newly-discovered evidence must, when considered with that produced at the trial, require a different verdict or finding.[5] The motion will not be granted where the newly-discovered evidence is merely cumulative,[6] and will ordinarily be refused where the evidence merely impeaches the credit or character of a witness,[7] though in exceptional cases, where it is of such a controlling character as to require a different verdict, it has been admitted.[8] The application must be made by motion, upon written grounds, and the motion should be sustained by affidavits or depositions, showing their truth,[9] and the affidavit should state that he could not discover the evidence by the exercise of due diligence.[10] When a review of the action of the trial court in overruling the motion is sought, the bill of exceptions should contain the newly-discovered testimony so far as it may have been before the lower court.

Sec. 782. For errors of law.—A new trial may be granted for any error of law occurring at the trial and excepted to by the party making the application.[11] The matters embraced under this provision are decisions or rulings made in the progress of the trial in the admission or exclusion of evidence, and in charging the jury. A judgment will not be reversed because of

[1] Callahan *v.* Caffarata, 39 Mo. 136; People *v.* Sackett, 14 Mich. 320.

[2] Smith *v.* Bailey, 26 O. S. 1.

[3] O. Code, sec. 5309.

[4] Fitzgerald *v.* Brandt, 36 Neb. 683; Searles *v.* State, 6 O. C. C. 332; Sutherlin *v.* State, 108 Ind. 389.

[5] Railroad Co. *v.* Long, 24 O. S. 133; Fleet *v.* Hollenkam, 13 B. Mon. 219; Ludlow *v.* Park, 4 O. 7.

[6] Reed *v.* McGreen, 5 O. 375; Perin *v.* Insurance Co., 11 O. 147; Howe *v.* Bodman, 1 Disn. 115, Hurd *v.* French, 1 C. S. C. R. 365; Hill *v.* Helman, 33 Neb. 735; Stevens *v.* Hey, 15 O. S. 313. See Hilliard's N. T., p. 499, sec. 13.

[7] Jackson *v.* Swope, 33 N. E. Rep. 909 (Ind., 1893); Christ *v.* People, 3 Col. 394; Fist *v.* Fist; 32 Pac. Rep. 719 (Col., 1893).

[8] Bailey *v.* State, 36 Neb. 808; Parker *v.* Hardy, 24 Pick 124; Greenleaf *v.* Grounder, 84 Me. 50–1; Tappin *v.* Clark, 32 Conn. 367.

[9] Code, sec. 5309.

[10] Moore *v.* Coates, 35 O. S. 183 See Thompson on Trials, sec. 2762.

[11] O. Code, sec. 5305.

the admission of improper evidence, unless it has caused substantial prejudice,[1] though a new trial should be granted where it has been clearly prejudicial.[2] The same rule is applicable to the rejection of testimony. The rejection of cumulative evidence may be immaterial ;[3] but the non-admission of competent evidence will be sufficient to warrant a new trial where it would have changed the verdict.[4] It is not necessarily error for the court to comment on the evidence.[5] A verdict will not be disturbed because of the fact that the court charged propositions not involved in the case, if not prejudicial,[6] or for an omission to charge upon any question arising unless requested to do so.[7] But where it appears from the whole record that the charge, though correct, might have been misunderstood by the jury, a new trial should be granted.[8]

Sec. 783. Form of motion for new trial.—Now comes the defendant [*or*, plaintiff] and moves the court to set aside and vacate the verdict of the jury, and for a new trial, for the following errors occurring during the progress of the trial, to-wit: [*Specify errors complained of, as in petition in error in sec.* 1275, Kinkead's Pldg.]

Sec. 784. Causes for which new trial not granted.—A new trial will not be granted on account of the smallness of damages, in an action for an injury to the person or reputation, nor in any other action where the damages equal the actual pecuniary injury sustained.[9]

Sec. 785. Application for new trial made by motion.—The application must be made by motion, upon written grounds, filed at the time of making the motion, for any of the causes enumerated by the code.[10] It must be sustained by affidavits or depositions, showing their truth, and may be controverted by affidavits or depositions.[11] The motion may be made by both parties to an action.[12] Allegations of fact in a motion not supported by the record nor made part of the bill of exceptions cannot be considered.[13] Nor can the refusal of a new trial, where no reasons assigned therefor are alleged in the motion,

[1] Whitman *v.* Keith, 18 O. S. 134.
[2] Bank *v.* Carson, 30 Neb. 104; Doe *v.* Pendleton, 15 O. 735.
[3] Allen *v.* Parrish, 3 O. 107.
[4] Hart *v.* Johnson, 6 O. 87; Blackburn *v.* Lane, 8 O. 81, 84.
[5] Abrams *v.* Wills, 6 O. 164.
[6] Schneider *v.* Hosier, 21 O. S. 98.
[7] Jones *v.* State, 20 O. 34; Maynard *v.* Fellows, 43 N. H. 255; *ante*, sec. 665, as to requests.
[8] White *v.* Thomas, 12 O. S. 312.
[9] O. Code, sec. 5306.
[10] O. Code, sec. 5305.
[11] O. Code, sec. 5308; Bingham *v.* Walk, 128 Ind. 164.
[12] Brainard *v.* Lane, 26 O. S. 632.
[13] Waggoner *v.* State, 30 O. S. 575.

be considered ;[1] nor will a motion be granted to let in technical defenses.[2] The motion must specifically point out or enumerate the causes, so that both trial and reviewing court may see the errors complained of.[3]

Sec. 786. Motion should be made when.—The application for a new trial must be made at the term the verdict, report or decision is rendered, within three days after the rendition thereof, unless the party is unavoidably prevented from filing the same in such time.[4] Where one of the three days within which to file a motion for a new trial is a Sunday, it is counted, unless it is the last of the three days, when it is excluded under Sec. 4951, Revised Statutes.[5] If made upon the ground of newly-discovered evidence, it may be made within a year after final judgment.[6] It has been held that this provision is mandatory, and that the court is powerless to extend the time.[7] Some courts construe the term "unavoidably prevented" so as to allow the motion to be made after term, but others hold that it must be made at the term,[8] which is the practice in Ohio.[9]

Sec. 787. Application for new trial after term.—An application for a new trial may be made when the grounds therefor could not have been discovered since the term at which the verdict, report or decision was rendered or made, by a petition, filed as in other cases, but not later than the second term after discovery, upon which summons shall issue. The facts stated in the petition will be considered denied without answer.[10] The case should be placed on the trial docket, and the witnesses examined in open court or their depositions taken, as in other cases. Such a petition must be filed within a year after the final judgment.[11] It is well settled that when made on the ground of newly-discovered evidence, the motion should be accompanied with the affidavit of the witness by whom the

[1] Hoffman *v.* Gordon, 15 O. S. 212; Westfall *v.* Dungan, 14 O. S. 276; McGonnigle *v.* Arthur, 27 O. S. 252.

[2] Bush *v.* Critchfield, 5 O. 109.

[3] Coleman *v.* Gilmore, 49 Cal. 340; Marbourg *v.* Smith, 11 Kan. 554. As to what should be stated, see Thompson on Trials, sec. 2759, and cases cited.

[4] Code, sec. 5307.

[5] Chicago Label and Box Co. *v.* Washburn, 15 O. C. C. 510.

[6] O. Code, sec. 5309.

[7] McDonald *v.* McAllister, 32 Neb. 518; Aultman *v.* Leahy, 24 Neb. 286; Davis *v.* State, 31 Neb. 243, 244; Krutz *v.* Craig, 53 Ind. 561.

[8] *Ex parte* Holmes, 21 Neb. 324. See State *v.* Hughes, 35 Kan. 632.

[9] Markward *v.* Doriat, 21 O. S. 637.

[10] O. Code, sec. 5309; Thompson on Trials, sec. 2764.

[11] O. Code, sec. 5309.

alleged facts can be proved.[1] The applicant must also show that he has used due diligence by stating the facts constituting the diligence, showing the time, place and circumstances under which inquiries were made.[2] The sufficiency of the application or petition under this provision may be tested by a demurrer.[3]

[1] Axtell *v.* Warden, 7 Neb. 188–9; 3 Graham & W. on N. T. 1021; Cummins *v.* Walden, 4 Blackf. 308.

[2] Blackburn *v.* Crowder, 110 Ind. 127.

[3] Brock *v.* Becker, 6 W. L. B. 755.

CHAPTER XXXVI.

BILLS OF EXCEPTIONS.

SEC.
788. Exception defined.
789. Exception when necessary, and when it must be taken.
790. Bill of exceptions defined.
791. Exceptions must be reduced to writing within what time.
792. Bills of exceptions must be presented to opposite counsel for examination.
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796. Allowance when judge absent or under disability.
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798. Judge not bound to sign bill unless it is a true one.
799. Immaterial exceptions.
800. Withdrawal of exceptions.
801. Purpose of and questions raised by bill of exceptions.
802. In what cases an exception or bill of exceptions not necessary.
803. In what cases an exception and bill of exceptions necessary.
803-1. Bill of exceptions on error from justices.
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SEC. 788. Exceptions defined.—An exception is defined by statute to be an objection to a decision of the court upon a matter of law.[1] The exceptions taken during the trial, written out with the evidence, is what constitutes the bill of exceptions, which next demands the attention of counsel after the disposition of the motion for a new trial.

SEC. 789. Exception when necessary, and when it must be taken.—An exception to be available, must be taken at the time the decision is made.[2] If it be to the decision of the court which is shown upon the face of the record—upon the entry of the judgment, it must be incorporated in the entry; that is if it is to some question of law involved in the pleadings. If the exception relates to some ruling or decision of the court occurring at the trial, either to the court, or to court and jury, as upon the admission or rejection of testimony, or instructions to the jury, or failure to instruct or to give a request to a jury; or if it be to an erroneous finding of facts by the court without a jury, or by a jury alone, the exceptions must be reduced to writing and brought upon the record in the form of a bill of exceptions.

As a motion for a new trial lays the foundation for a proceeding in error, it follows that no exception can be taken that can avail

[1] Code, sec. 5297.

[2] Code, sec. 5298.

anything until decision is had upon the motion. The steps to save for review those matters claimed erroneous, are, to have a decision on the motion and take an exception to the overruling thereof. A bill of exception cannot be allowed and signed before decision of the motion, and before judgment is entered on the verdict.[1]

Sec. 790. Bill of exceptions defined.—A bill of exceptions consists of a complete statement of all of the evidence and rulings of the court. The facts of the case as shown by the evidence are embodied in a bill of exceptions, signed and certified to by the judge to be a correct statement of all the evidence taken at the trial. The formal statement of the exceptions and the evidence constitutes the bill of exceptions. No particular form of exception is required; and the exception must be stated with the facts, or so much of the evidence, as is necessary to explain it, and no more, and the whole as briefly as possible.[2]

Sec. 791. Exceptions must be reduced to writing within what time.—The statute requires that the exceptions must be reduced to writing, not more than fifty days beyond the date of overruling of the motion for a new trial, or from the adjournment of the term at which a decision of the court is rendered by the court, when a motion for a new trial is not necessary.[3] The bill of exceptions is prepared by the official stenographer, who takes the testimony upon the trial.

The time within which a bill of exceptions may be taken with respect to the ruling of the court in its charge to the jury, which ruling is afterwards embodied in a motion for a new trial, which is overruled, is computed from the date when the motion for a new trial is overruled, and not from the date when the charge is given and the exception taken. If a motion for a new trial is not made, and the party relies upon the exception taken to the charge during the trial, which he may do, the time in that event should be computed from the date when the charge was given.[4]

Sec. 792. Bill of exceptions must be presented to opposite counsel for examination.—Where the exceptions are not allowed and signed during the progress of the trial (and this is practically an impossibility), the party excepting (or the party against whom the verdict or decision is rendered) must submit the bill of exceptions to the opposite counsel for examination not less than

[1] T. & O. C. C. Ry. *v.* Marsh, 17 O. C. C. 379; s. c. 9 Cir. Dec. 548.

[2] Code, sec. 5299.

[3] Code, secs. 5298, 5301.

[4] Cincinnati St. Ry. *v.* Wright, 54 O. S. 181.

ten days before the expiration of the fifty days allowed by statute for the trial judge to allow and sign it.[1] This provision is mandatory. The bill of exceptions must be presented to the opposite counsel within the time prescribed by the statute, and to the judge within five days before the expiration of the fifty days, in order to confer jurisdiction over the subject-matter upon the trial judge; the latter is without authority to sign the bill if the requirements of the statute are not complied with in this respect.[2] Approval by the judge, when the bill has not been presented to opposite counsel within the proper time is of no avail. A stipulation between the parties authorizing the judge to sign the bill which is withdrawn before the presentation of the bill is likewise without effect.[3] It is the duty of the judge, where the condition as to the presentation of the bill to opposite counsel is not complied with, to refuse to sign and allow the bill, unless consent of such opposite counsel be given.[4] The statute authorizes the party to consent within fifty days after the motion for a new trial.[5]

Where an incomplete bill of exceptions is presented to opposite counsel on the last day for such presentation, counsel are justified in refusing to consider or approve the same. It must be complete when presented for examination. And if it is then presented to opposite counsel in complete form after the expiration of the time for presentation, the judge cannot sign the same. The court has always construed the statutes relating to bills of exceptions strictly.[6]

Sec. 793. Trial judge may extend time for signing.— The trial judge or judges are invested with discretionary power to extend the time for signing the bills of exceptions for a period not exceeding ten days beyond the expiration of the fifty days fixed by statute for the allowance and signing thereof. Such extension must be indorsed on the bill.[7] But the judge cannot exercise this power of extension unless both conditions, viz., the presentation to counsel and the judge within the time fixed by statute, are complied with. And an extension without indorsement upon the bill is of no effect.[8] In addition to the indorsement of the extension of the time upon the bill, a journal entry thereof should be made, as it is an order, and all orders should be placed on the journal.

[1] Code, sec. 5302.

[2] Neuman *v.* Becker, 54 O. S. 323; Long *v.* Newhouse, 57 O. S. 348, 365.

[3] Long *v.* Newhouse, *supra.*

[4] Pugh *v.* State, 51 O. S. 116.

[5] Sec. 5302.

[6] State *ex rel. v.* Evans, 12 O. C. C. 245.

[7] Code, sec. 5302.

[8] Neuman *v.* Becker, 54 O. S. 323.

The provision for the extension of time is for the convenience of the court, to enable the judge to examine and allow the bill, and not to enable the party excepting to present it to opposite counsel.[1]

Sec. 794. To be perfected according to law in force at the time.—The amended statute with reference to the perfection and allowance of bills of exception was made applicable to cases pending, and to cases pending for the allowance of bills.[2] And it has been held that "a bill of exceptions, to be available, must be perfected and filed in accordance with the provisions of the statute in force at the time."[3] This is the principle of law governing statutes regulating procedure.

Sec. 795. Allowance and signing—Time within which to be presented to judge.—Where the trial judge or judges are not absent from the county, the bill of exceptions must be submitted for his or their signature, not less than five days before the expiration of the fifty days provided for the allowance and signing thereof.[4] And the record must show affirmatively that the bill was so presented.[5] It was shown in the preceding section[6] that the trial judge is without authority to allow or sign the bill if the requirement of the statute as to the presentation of the same to opposite counsel within the ten days, and to the judge within five days before the expiration of the fifty days provided for the allowance thereof, is not complied with, even no power to grant the extension provided for.[7]

A bill of exceptions is probably rendered invalid where subsequent to its being signed and sealed and allowed, special charges asked and refused, are added thereto, and the bill thus enlarged, is not re-signed and sealed and allowed.[8]

Sec. 796. Allowance when judge absent or under disability.—If the judge or judges be absent from the district or circuit when the bill is prepared for allowance, the same may then be deposited within said fifty days with the clerk. It must then be allowed and signed, (if correct) on or before the fifth day of the term of court next ensuing after the expiration of the fifty days.[9]

[1] Pugh *v.* State, 51 O. S. 116.

[2] Sec. 5301.

[3] Young *v.* Shallenbarger, 53 O.S.291.

[4] Code, sec. 5302. There is some apparent conflict between this section and 5301, the latter providing that the bill be presented within fifty days, &c. The requirement that the same be presented five days before the expiration of the fifty days is evidently to give the judge an opportunity to examine the bill.

[5] Felch *v.* Hodgman Mfg. Co., 61 O. S. 93.

[6] *Ante*, sec. 792.

[7] Neuman *v.* Becker, 54 O. S. 323; Long *v.* Newhouse, 57 O. S. 34 , 365.

[8] Hauck Brewing Co. *v.* Gisecke, 16 O. C. C. 224; s. c. 8 Cir. Dec. 372.

[9] Sec. 5301.

If the trial judge is sick and unable to attend to such signing, or in case of the death of such trial judge, or expiration of the term of office or other disability, the bill may then be presented to any judge of such district, who is required to allow and sign it [1]

Sec. 797. Filed and made part of record, but not spread on the journal—Entry of allowance.—The bill of exceptions is filed with the pleadings, and, if the party filing it requests it, is made part of the records, but is not spread on the journal. An entry of the allowance and signing of the same must be entered upon the journal of the court within the time fixed for such allowance and signing.[2]

An entry in the following terms: "This day came the defendant and filed its bill of exceptions, duly allowed, signed and sealed, and the same at its request is ordered to be part of the record in this case, all of which is done within the fifty days allowed," made on the journal, shows with sufficient certainty that the bill of exceptions therein referred to, was presented to, and signed, sealed and allowed by the trial judge.[3] The transcript of journal entries filed with the petiton in error must contain the entry of allowance of the bill of exceptions, otherwise it is defective. If a bill of exceptions has actually been allowed and signed by the judge properly, but the entry of such allowance is omitted, it may be supplied by an entry *nunc pro tunc.*[4]

Sec. 798. Judge not bound to sign bill unless it is a true one.—It is well settled and well understood that the trial judge is the sole judge of the correctness of a bill of exceptions, and his decision with respect thereto is final.[5] He may make such changes and amendments to conform to his view as he may deem necessary.[6] A judge may therefore refuse to sign a bill on the ground that it is not a true one, but he cannot refuse to allow and sign the same when it is correct, and if he improperly refuses to sign such a bill he may be compelled to do so by mandamus.[7]

Sec. 799. Immaterial exceptions.—No exception will be regarded unless it is material and prejudicial to the substantial rights of the party excepting.[8]

[1] Sec. 5301.

[2] Sec. 5302.

[3] Railway Co. *v.* Kernochan, 55 O. S. 306; *cf.* Felch *v.* Hodgman Mfg. Co., 61 O. S. 93.

[4] Bothe *v.* Railroad Co., 37 O. S. 147. Mitchell *v.* Thompson, 40 O. S. 110.

[5] State *ex rel. v.* Bickham, 4 O. C. C. 246; Creager *v.* Meeker, 22 O. S. 207.

[6] Hyde *v.* Boyle, 89 Cal. 590.

[7] Kinkead's Code Pldg., secs. 795, 1295, and cases above cited.

[8] Code, sec. 5303.

Sec. 800. Withdrawal of exceptions.—Exceptions taken to the decision of a court of record may, by leave of such court, be withdrawn from the files by the party taking the same at any time before proceedings in error are commenced, and before the exceptions are recorded.[1] Just how exceptions are to be withdrawn from the files is not made clear. A party may withdraw particular exceptions taken during the trial and have the same noted by the stenographer in the record. But after the bill of exceptions is made up and allowed, some sort of a paper writing withdrawing exceptions would undoubtedly have to be filed.

Sec. 801. Purpose of and questions raised by bill of exceptions.—The purpose of bills of exceptions is to bring up questions of law for reviewal; these cannot be considered, unless the facts are before the court upon which the questions arise. Some questions of evidence may also be considered by the reviewing court. The court on error may consider the question whether there was *any* evidence,[2] or whether there is clear and convincing evidence, to see whether the rule requiring such evidence, has been violated.[3] It then becomes a question of law.

It will bring up all questions of admissibility of evidence, the law of the case as involved in the charge, or misconduct of parties, counsel or jury, or the action of the court upon a motion for a non-suit.

Sec. 802. In what cases an exception or bill of exception not necessary.—In all cases where the errors complained of are apparent upon the face of the record, a bill of exceptions is unnecessary. For instance it is not necessary when the question is upon the action of the court upon demurrer; nor is an exception even necessary in such case.[4] Nor is it necessary in order that a final judgment may be reviewed that the party seeking reversal should except thereto at the time of its rendition;[5] nor is it necessary in suits in equity tried to the court, where the only objection is to the conclusions of law and there is no controversy over the facts.

Sec. 803. In what cases is an exception and bill of exceptions necessary.—When the decision is not entered on the record, or the grounds of complaint or objection do not appear in the entry,

[1] Code, sec. 5304.

[2] House *v.* Elliott, 6 O. S. 497; Seville *v.* Wagner, 46 O. S. 52; Kaufman *v.* Broughton, 31 O. S. 424; Kinkead's Pldg., sec. 1287.

[3] Ford *v.* Osborne, 45 O. S. 3.

[4] Ruffner *v.* Board, 1 Disney, 196; Davis *v.* Hines, 6 O. S. 473.

[5] Bank *v.* Buckingham, 12 O. S. 402; Justice *v.* Lowe, 26 O. S. 372.

where the exception is to the decision of the court upon a motion for a non-suit, or to arrest the evidence of plaintiff from the jury,[1] or for a new trial for misdirection by the court to the jury, or because the verdict, or, if a jury is waived, the finding of the court, is against the law and the evidence, or on the admission or rejection of evidence, or where it is to the finding of fact by the court in trials in suits in equity, or where it is to trials by referees, bills of exceptions are necessary.[2] In all such cases a motion for a new trial and bill of exceptions upon the ruling of the court thereon is necessary in order to bring the facts upon the record.[3] A bill of exceptions is necessary in trials to the court where special findings of facts are made, and objection is made to such finding.[4]

Sec. 803-1. Bill of exceptions on error from justices.—A general statute provides that in all cases before a justice of the peace, whether tried to a jury or by the justice, either party has the right to except to the decisions of the justice upon matters of law arising in the case. Such exceptions must be taken at the time the decision is made, and if requested by the party objecting, time must be given to reduce the exceptions to writing, but not more than ten days, nor less than five beyond the date, or overruling of the motion for a new trial, or from the date on which the decision of the justice is rendered. Within the time so limited for reducing the same to writing, the justice is required to sign and file the bill of exceptions with the papers in the case, and note such filing in his docket, and transmit the same with his transcript and the original papers in the case within ten days of the date of signing to the clerk of the common pleas court.[5] The bill of exceptions need not be spread on the docket.[6] This section also applies to proceedings in error in forcible entry and detainer,[7] although there is a special statute authorizing a bill of exceptions to be taken, when necessary in such proceedings, in petitions in error to review the action of a justice upon questions of law and evidence.[8] The exceptions authorized in such cases by the latter statute are those relating to the weight of evidence.[9] This statute does not provide for the manner of preserving the exceptions therein authorized, and so we have to look to the general statute.[10] The general statute also applies to criminal cases.[11]

[1] Weaver *v.* Railway Co., 55 O. S. 491.
[2] Code, sec. 5301; 91 O. S. 141.
[3] Brown *v.* Mott, 22 O. S. 149.
[4] Spangler *v.* Brown, 26 O. S. 389.
[5] R. S., sec. 6565.
[6] R. S., sec. 595.
[7] State *v.* Yeatman, 4 O. C. C. 246.
[8] R. S., sec. 6610.
[9] State *v.* Wood, 22 O. S. 537.
[10] R. S., sec. 6565.
[11] Ransick *v.* State, 15 O. C. C. 371.

The sole object of bills of exceptions from justices is to bring up questions of law for review,[1] and a bill containing the testimony, but presenting no questions of law will not be considered.[2] The common pleas court has no authority to consider the question whether a judgment is sustained by the weight of evidence, but may determine whether there was any evidence to sustain it.[3]

A statute also authorizes a bill of exceptions to be taken when necessary, in petitions in error to review the action of a justice in discharging or refusing to discharge an order of attachment.[4]

Sec. 803-2. Bill of exceptions in criminal cases.—The criminal code authorizes a defendant to present a bill of exceptions to the court, the same as in civil cases. When taken to the overruling of a motion for new trial, because the verdict is not sustained by sufficient evidence, or is contrary to law, the bill of exceptions must contain all the evidence. The taking of the bill is governed by the rules established in civil cases.[5]

The statute authorizing bills of exceptions to be taken before a justice of the peace in civil cases, is applicable to criminal cases before the same tribunal.[6]

There seems to be no statute conferring authority upon a mayor of a municipality to allow a period of ten days from and after the overruling of a motion for a new trial, within which to prepare and file a bill of exceptions.[7] The statute relating to bills of exceptions in civil cases before justices has been held inapplicable to criminal cases in mayor's courts.[8]

[1] Baer *v.* Otto, 34 O. S. 15.

[2] Leonard *v.* Cincinnati, 26 O. S. 447.

[3] Yager *v.* Greiss, 1 O. C. C. 531.

[4] R. S., sec. 6524. The justice must sign and seal such bill, containing the evidence, the rulings of the justice, and the exceptions thereto. Seville *v.* Wagner, 46 O. S. 52; Hoyman *v.* Beverstock, 8 O. C. C. 473.

[5] R. S., sec. 7304.

[6] Ransick *v.* State, 15 O. C. C. 371.

[7] Bradner *v.* Grundetisch, 15 O. C. C. 52.

[8] *Id.*

IV.

Judgment, Execution, &c.

CHAPTER XXXVII.

JUDGMENT.

SEC.
804. Judgment defined.
805. Final and interlocutory—Distinction.
806. Jurisdiction of court to render.
807. Judgment not founded on statement of claim of parties or without issue.
808. Entry of judgment and its effect.
809. Same, continued—Judgment becomes a lien when.
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814. Sale of mortgaged property, continued—Decree should fix days of grace.
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816. Sale of mortgaged property, continued—Property situated in more than one county—How sold, appraised, &c.
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819. Judgment upon default.
820. Effect of taking default judgment for less than due.
821. Opening default judgment.
822. Judgment by confession.
823. Judgment on warrants of attorney.
824. Judgment upon verdict.
825. Judgment *non obstante veredicto.*
826. When defendant may have judgment.
827. Vacation of judgment for fraud.
828. The date of judgment.

SEC. 804. Judgment defined.—A judgment is defined by the code as follows: A judgment is the final determination of the rights of the parties in action; and a direction of a court or judge, made or entered in writing, and not included in a judgment, is an order.[1] This definition includes final decrees of courts of equity,[2] as well as interlocutory orders.[3]

SEC. 805. Final and interlocutory—Distinction.—The distinction between interlocutory and final judgments and orders is of considerable importance because of the rule that only final orders

[1] R. S., sec. 5310. Coke defines it as, "the very voice of law and right." Co. Litt. 39*a*. A judgment is the end of the law. Blystone *v. Id.*, 51 Pa. St. 373. "Every judgment directly enforces some right or suppresses some wrong, thereby producing the end sought by every humanely conceived law. Its incidental results, extending far beyond the time at which it is pronounced, and the parties whose rights it determines attach themselves to property or to privies in blood or in estate, and continue in binding force and obligation for indefinite periods of time." Freeman on Judgments, sec. 1.

[2] Freeman on Judgments, sec. 14.

[3] *Id.*, sec. 15. "An order is the judgment or conclusion of the court upon any motion or proceeding." Gilman *v.* Contra Costa Co., 8 Cal. 52, 57.

or those affecting substantial rights are subject to review upon error.

A final order is defined by the code to be "an order affecting a substantial right in an action, when such order in effect determines the action and prevents a judgment; and an order affecting a substantial right made in a special proceeding, or upon a summary application in an action after judgment, is a final order, which may be vacated, modified or reversed."[1] A general formula showing the distinction probably applicable to all cases may be given thus:

Looking to the substance and effect,[2] any judgment that is a final determination of the rights of the parties in the particular action,[3] which disposes of all of the issues of law and fact raised by the pleadings, unless the decision upon one question be conclusive of the case,[4] and which adjudicates the rights of all the necessary parties,[5] whether it be upon the merits or whether it be sent out of court before a hearing is had upon the merits, if it effectually disposes of the case,[6] may be classed as a final judgment.

All other orders made during the pendency of the cause and before a final hearing on its merits are interlocutory.[7]

Sec. 806. Jurisdiction of court to render.—The constitution requires that full faith and credit shall be given in each State to the records and judicial proceedings of every other State, but does not apply to judgments rendered by courts without jurisdiction over the person and the subject-matter of the action.[8] Before a court can pronounce a valid judgment, it must have jurisdiction of the person and the subject-matter of the action.[9] Parties must be brought within the jurisdiction by means of process properly served, or by their voluntary appearance.[10] Consent or voluntary appearance in some, possibly nearly all cases, may give the court jurisdiction over the person,[11] but

[1] Whittaker's Code, sec. 6707.

[2] Railroad Co. *v.* Sloan, 31 O. S. 1.

[3] Klink *v.* Steamer Cusseta, 30 Ga. 504.

[4] King *v.* Barnes, 107 N. Y. 645; Low *v.* Crown Point Co., 2 Nev. 75; Texas Ry. Co. *v.* St. Ry. Co., 75 Texas 83.

[5] Commonwealth *v.* McCleary, 92 Pa. St. 188; Schultz *v.* McLean, 76 Cal. 608; Whittaker *v.* Gee, 61 Tex. 217.

[6] Freeman on Judgments, sec. 29.

[7] See more fully, Kinkead's Code Plg., sec. 1236; 1 Freeman on Judgments, sec. 29, for illustrations.

[8] Pennywit *v.* Foote, 27 O. S. 600.

[9] Moore *v.* Starks, 1 O. S. 369.

[10] Johnson *v.* Delbridge, 35 Mich. 436; Duncan *v.* Gerdine, 59 Miss. 550; Townsend *v.* Same, 21 Ill. 540; Wilkinson *v.* Baley, 71 Wisc. 131.

[11] Gilliland *v.* Sellers, 2 O. S. 223; Black on Judgments, sec. 225.

Speaking of jurisdiction over the person, Judge Bradbury in Railroad Company *v.* Morey, 47 O. S. 210, said: "It is a privilege, however, that is personal, and may be waived; and this court has uniformly held, that a defendant by appearing in court, and without objecting to its jurisdiction over his person, invoking any action in the cause, waives this privilege, and submits his person

can never operate to confer jurisdiction over the subject of the action over which the law specially provides that the court cannot exercise jurisdiction.[1]

That a judgment rendered by a court without jurisdiction is an absolute nullity, and may be disregarded whenever and wherever it may be met is a familiar doctrine.[2] It follows, therefore, that the jurisdiction in any particular case may always be inquired into whenever a judgment is made the foundation of an action either in a court of the State in which it is rendered, or of any other State, without infringing upon the provision of the constitution,[3] and is always subject to direct or collateral impeachment upon this ground.[4] A want of jurisdiction may be shown either as to the subject-matter, the person, or in proceedings *in rem* as to the thing.[5] There are some important questions connected with proceedings *in personam* and *in rem.* The court acquires jurisdiction over the thing by constructive service upon the theory that the owner of property gives such attention to it as that he is bound to take notice of any proceedings in the courts by which the same will be attached or laid hold of in a proceeding *in rem.*[6]

But wherever the judgment must first operate upon the personal action or status of a party, jurisdiction cannot be acquired so as to render a valid judgment which may operate upon property within the jurisdiction owned by the defendant who is without jurisdiction, and upon whom constructive service only is had. For example, a personal judgment cannot be had in a suit for alimony where the defendant is not personally served with process, or does not voluntarily enter his appearance, even though such defendant may have property within the jurisdiction of the court out of which the judgment could be made.[7] Nor

to the jurisdiction of the court." Harrington *v.* Heath, 15 O. 483, 487–8; Gilliland *v.* Sellers, 2 O. S. 223; Wood *v.* O'Farrell, 19 O. S. 427; Thomas *v.* Penrich, 28 O. S. 55; Fitzgerald *v.* Cross, 30 O. S. 444, 450; O'Neal *v.* Blessing, 34 O. S. 33; Handy *v.* Insurance Co., 37 O. S. 366; Elliott *v.* Lawhead, 43 O. S. 171.

[1] Gilliland *v.* Sellers, 2 O. S. 223; Fleischman *v.* Walker, 91 Ill. 318; Santon *v.* Ballard, 133 Mass. 464.

[2] Pennywit *v.* Foote, 27 O. S. 600; Spier *v.* Corll, 33 O. S. 236; Gilliland *v.* Sellers, 2 O. S. 223; Beverly *v.* Burke, 9 Geo. 440; St. Louis, &c., Co. *v.* Coal Co., 111 Ill. 32; Winemiller *v.* Laughlin, 51 O. S. 421, 430.

[3] Spier *v.* Corll, 33 O. S. 236; Pennywit *v.* Foote, 27 O. S. 600.

[4] Kingsborough *v.* Tousley, 56 O.S. 450

[5] Pennywit *v.* Foote, 27 O. S. 600.

[6] Bunnell *v.* Bunnell, 25 Fed. 214.

[7] Suit for divorce upon constructive service may be considered as a proceeding *in rem* so far as it affects the marital status, but a suit for alimony is said to be *in personam* and void for want of personal service. Bunnell *v.* Bunnell, 25 Fed. 214. Yet where property is within the jurisdiction of the court and the defendant, though a non-resident, but is personally served or appears, alimony may be granted. Johnson *v.* Johnson, 31 Neb. 385; Stewart on M. & D., sec. 217; Lytle *v.* Lytle, 48 Ind. 200; Middleworth *v.* McDowell, 49 Ind. 386. See also Cox *v.* Cox, 19 O. S. 502; Wood *v.* Waddle, 44 O. S. 449, 456; Dillon *v.* Starin, 44 Neb. 881; Anderson *v.* Anderson, 55 Mo. App. 268.

can an injunction be made operative upon the acts of a non-resident defendant with reference to property within the jurisdiction of the court, upon constructive service only. A personal judgment against one over whom the court has no jurisdiction is wholly void.[1]

In considering the question of the collateral impeachment of a judgment for want of jurisdiction, it must be remembered that the law presumes, until the contrary is shown, that the court was possessed with the requisite jurisdiction to render it,[2] and this is the rule although the fact may not affimatively appear on the record.[3]

Sec. 807. Judgment not founded on statement of claim of parties, or without issue.—The question of the effect of a judgment rendered in the absence of any issues of law or of fact has been discussed by the writers on Judgments, but without any authoritative conclusion. Both Mr. Freeman and Mr. Black seem to be of the opinion that a judgment so rendered is without doubt irregular and subject to reversal, and both cite decisions by the court of appeals of the State of Mississippi to the effect that a judgment rendered without issues to be determined by it, is void[4] One of the authors suggests, rather timidly, as Mr. Freeman says, that a judgment without an issue is void, because until an issue is formed there is no question presented to the court for decision,—no subject-matter upon which it can act.[5] This can hardly be a correct doctrine, as it would render nugatory default judgments.

But a judgment upon a subject of litigation within the jurisdiction, but not brought before the court by any claim or statement of the parties, is a very different question. A judgment so rendered has been held to be null and void, and subject to be collaterally impeached.[6] This rule will not be carried to such

[1] Spier *v.* Corll, 33 O. S. 236; Ward *v.* Green, 28 S. W. 574; 88 Tex. 177 (Constructive service only).

[2] Morgan *v.* Burnell, 18 O. 535. "There is no principle of law better settled than that every act of a court of competent jurisdiction shall be presumed to have been rightly done, until the contrary appears; this rule applies as well to every judgment or decree rendered in the various stages of their proceedings, from the initiation to their completion, as to their adjudication that the plaintiff has a right of action." Voorhees *v.* Jackson, 10 Pet. 449. See Winemiller *v.* Laughlin, 51 O. S. 421, 431, and cases cited.

[3] Reynolds *v.* Stansbury, 20 O. 345.

[4] Freeman on Judgments, sec. 135*a;* Black on Judgments, sec. 184; Steele *v.* Palmer, 41 Miss. 89; Armstrong *v.* Barton, 42 Miss. 506; Porterfield *v.* Butler, 47 Miss. 165, 170; 12 Am. Rep. 329. Held in Doyle *v.* Smith, 1 Col. 15, that the want of a plea or issue constitutes but an error of judgment. See Gittings *v.* Baker, 2 O. S. 21.

[5] *Id; cf.* Cincinnati Hotel Co. *v.* Trust Co., 25 W. L. B. 375.

[6] Spoors *v.* Coen, 44 O. S. 497. "A judgment rendered where no case has been stated is as much a judgment upon a case *coram non judice* whatever may be the jurisdiction of the court rendering it, as a judgment upon a case, however perfectly stated, before a court not clothed with jurisdiction to hear and determine it." *Id.*

an extreme as to make it necessary that the statement of the case be so perfect in form and substance, as to sustain the attack of a demurrer;[1] but it will be sufficient to sustain the jurisdiction of the court, if the subject-matter is within the jurisdiction, and the statement may be perfected by amendment.[2] So, unless a case is presented that can be amended, there is no case upon which a judgment can be rendered.[3]

Sec. 808. Entry of judgment and its effect.—All judgments and orders must be entered on the journal of the court, and specify clearly the relief granted or order made in the action.[4] This section was written before the decison by the supreme court in *Coe v. Erb*, 59 O. S. 259. It was decided in that case that for the purpose of creating a lien, the judgment must not only be pronounced but entered on the journal. It is elementary, however, that a judgment speaks for some purposes from the time of its rendition or pronouncement by the judge and determines the rights or status of persons or property from that time.[5] This rule is based upon the theory that an entry is not the judgment, but merely an evidence of it, and therefore does not control the validity of acts done in carrying out the provisions of the judgment nor in any manner determine the rights of parties thereunder as to any matters save possibly to serve the purpose of evidence in other actions.[6] The rendition of the judgment is the judicial act while its entry is purely ministerial,[7] and an irregularity or negligence in the performance of the latter should not cause any prejudice. For example, a delay in placing the entry upon the journal will not prevent a receiver from taking hold of the property so as to cut out attaching creditors,[8] nor will it affect the validity of a decree in divorce.[9] Whether or not the statute of limitations begins to run from the date of actually placing the entry on record, or from the date of the rendition or pronouncement of the judgment does not seem to have been squarely decided, although there does not seem to be much room for argument, as the statute reads so long "after the *rendition* of the judgment or the making of the final order."[10] The judgment and entry may be considered as two different acts, and it seems reasonable that the statute would commence

[1] *Id;* Buchanan *v.* Roy, 2 O. S. 252.

[2] Shamokin Bank *v.* Street, 16 O. S. 1, 10.

[3] Spoors *v.* Coen, 44 O. S. 497.

[4] R. S., sec. 5331.

[5] State *ex rel v.* Meacham, 6 O. C. C. 31; Kinkead's Plg., sec. 1063.

[6] As to the latter point—evidence—only. Hall *v.* Hudson, 20 Ala. 284.

[7] State *ex rel v.* Meacham, *supra;* Citing Black on Judgments, sec. 106. See also Freeman on Judgments, sec. 38; Conwell *v.* Kuykendall, 29 Kan. 707; Estate of Cooke, 77 Cal. 220; 11 Am. St. 267.

[8] Kinkead's Code, Plg., sec. 1063.

[9] State *ex rel v.* Meacham, 6 O. C. C. 31; Holt *v.* Holt, 40 Pac. 390; 107 Cal. 258.

[10] R. S., sec. 6723.

to run from the *rendition*—the judicial act; and not from its entry—the ministerial act. If it takes the concurrence of the two acts, the pronouncement and the actual entry on the journal, then the limitation runs from the latter act.[1] There may be some question as to what constitutes a rendition in some cases. It has been held that a memorandum handed down by the judge not signed by him, directing how the judgment shall be, is simply an indication to the parties as to how the judgment shall be framed and is not in itself the final judgment.[2]

Mr. Freeman points out a distinction between the entry of judgments and decrees and the effect of the failure to enter; that a judgment can speak but by the record, while a decree takes effect immediately after being pronounced by the court, that its enrollment adds nothing to its force nor to its competency as evidence.[3] There may be some cogency in this statement, as the cases to which our attention has been principally directed have been decrees, but still we are not ready to admit that it is entirely true. Judge Elliott seems to take issue with the general rule which we have been stating in this section, holding to the opinion that "it can be true only in a limited sense that a judgment is valid, although not entered of record, for it cannot be appealed from until entered, nor used as evidence, nor regarded as a lien. In a sense, the judgment exists, although not entered of record, and the parties undoubtedly have a right to compel its entry, but until entered, essential elements are, as we believe, entirely absent."[4] And yet granting a l this, the decree or judgment is beyond question operative in some ways before it is actually entered.

The object of entry in the books designated for that purpose is not only to perpetuate them as evidence, but to give notice to the public of the rendition of the judgment. As the law designates certain books for that purpose, compliance with this requirement is essential.[5] The time of entering judgment or filing the entry is in Ohio regulated by rule, which must be done by the clerk at the term at which it is rendered.[6]

[1] In Young *v.* Shallenbarger, 53 O. S. 291, the judgment was entered upon the verdict when it was rendered and before the time allowed for filing a motion for a new trial; it was held that the statute run from the date of judgment, not from the overruling of the motion for a new trial. See sec. 889, *post.*

[2] Robinson *v.* Govers, 22 N. Y. Supp. 249.

[3] Freeman on Judgments, sec. 39; citing Bates *v.* Delavan, 5 Paige 303; Winans *v.* Dunham, 5 Wend. 47.

[4] Elliott's Gen. Pr., sec. 1015. Coe *v.* Erb, 59 O. S. 259, supports this.

[5] Birdsall *v.* Russell, 29 N. Y. 220; Jones *v.* McNarrin, 28 Am. Rep. 66; 68 Me. 334.

[6] State *ex rel v.* Meacham, 6 O. C. 31. See generally Freeman on Judgments, sec. 39*a*.

Sec. 809. Same, continued—Judgment becomes a lien when.—The statute provides that lands and tenements within the county where the judgment is entered is bound from the first day of the term at which it is rendered.[1] It has been decided that to create a lien upon the lands of the judgment debtor under this provision, as of the first day of the term at which the judgment is rendered, the same must not only be pronounced during the term, but an entry thereof must be made on the journal during the term. An entry *nunc pro tunc* after the adjournment and in vacation, will not create a lien upon such lands as against the rights of a *bona fide* purchaser from the first day of the term.[2] The court in delivering the opinion in this case, gives voice to the doctrines stated in the previous section[3] that for some purposes a judgment may be regarded as rendered as soon as it is pronounced. "The requirement that all judgments must be entered on the journal carries the implication that until that is done the judgment is inchoate only; it is incomplete. Though possessing the character of potentiality, it lacks the character of actuality, and hence it is without probative force." Execution for the seizure of goods and chattels or lands may not properly issue on a judgment until it has been duly entered. The judgment is not rendered within the meaning of the statute making it a lien upon lands until it is entered on the journal. The entry constitutes, prior to the making of the final record, notice to the world of the lien of the judgment.[4]

Sec. 810. Several judgment for or against several plaintiffs or defendants—Joint judgment.—The rule of practice prevailing at common law with reference to the rendition of a judgment against several defendants worked great inconvenience. The rule was that in an action upon a joint contract the plaintiff must recover against all of the defendants or be defeated. The general rule at common law was that in an action against several defendants upon a joint contract, or upon several distinct contracts, judgment must be rendered against all or neither of the defendants.[5] At chancery however, whenever the claim against several defendants was separate and distinct, so that a case could be tried as to one or more defendants, without interfering with the rights or liabilities of other defendants, a separate decree could be rendered.[6] The code has changed the common-law rule, adopting that practiced in courts of equity and has

[1] Code, sec. 5375.
[2] Coe *v.* Erb, 59 O. S. 259.
[3] *Ante*, sec. 808.
[4] Coe *v.* Erb, 59 O. S. 259.
[5] Lampkin *v.* Chisom, 10 O. S. 451; Roby *v.* Ramsberger, 27 O. S. 674, 676; Black on Judgments, secs. 82, 120, 206; Freeman on Judgments, sec. 43; Elliott's Gen. Pr., sec. 1022.
[6] Dougherty *v.* Walters, 1 O. S. 202.

provided[1] that: "Judgment may be given for or against one or more of several plaintiffs, and for or against one or more of several defendants." This should be taken in connection with the next section[2] which provides that: "In an action against several defendants, the court may render judgment against one or more of them, leaving the action to proceed against the others, *whenever a several judgment is proper.*" The italics are important and the matter italicized reflects upon the meaning of both sections. The latter part of section 5311 provides that "by the judgment the court may determine the ultimate rights of the parties on either side, as between themselves, and grant to the defendant any affirmative relief to which he is entitled."

These two sections relate to several judgments upon joint and several, or several obligations, or to cases where *a several judgment is proper*, and not to an action upon purely joint contracts or obligations. To make use of the provision, the real cause of action should be several and not joint.[3]

The modification made by the statute is that where the action is declared upon as an alleged joint contract, judgment may be rendered "for or against one or more of several defendants" where it turns out upon the trial that only one or more of several defendants are liable, without subjecting the plaintiff to the necessity of bringing a new action.[4]

"The object of the provisions is to prevent a failure of justice when there happens to be too many, or too few parties brought into court. The questions arising on non-joinder, or misjoinder of parties are the cause of much delay, vexation and disappointment, resulting not unfrequently in an entire failure of justice. This section will prevent this hereafter," say the eminent jurists who prepared this code provision. Considering the liberal powers of amendment, and the provision in section 5311 authorizing the court to determine the ultimate rights of the parties, the court is enabled to mould the judgment to conform to the

[1] Sec. 5311.

[2] 5312.

[3] Sec. 371 (5311) of the code authorizing several judgments in joint actions, has no legitimate bearing on the right to commence a several suit upon a cause of action confessedly joint. It relates to the termination and not to the commencement of a suit, and before it can be applied, the testimony must show that the real cause of action was several and not joint." Harris *v.* Rainey, 14 O. S. 287, 291.

In an action on a contract against two or more defendants, where it appears that a several judgment is proper it may in the discretion of the court be taken against one or more, leaving the action to proceed as to the others, that such a separate judgment against one or more operates as a severance of the cause of action, and after such judgment the issues made by the remaining defendants are to be heard and determined as if they had sued alone. Hempy *v.* Ransom, 33 O. S. 312, 320.

[4] Lampkin *v.* Chisom, 10 O. S. 451. Roby *v.* Rainsberger, 27 O. S. 674.

rights of the respective parties.[1] Judge McIlvaine in *Aucker v. Adams*[2] has laid down the following rule, which we feel justified in inserting here :

"There can be little doubt that the cases wherein it is proper to render a several judgment against one or more of the defendants, leaving the action to proceed against the others, are limited, as a general rule at least, to actions on joint contracts. The difficulty, however, is in determining whether these cases, wherein such judgment is forbidden, include actions on joint and several contracts, on which plaintiffs might have elected to prosecute several actions, or whether they are confined to actions on those joint contracts where the plaintiff had no election as to the joinder of defendants, his only remedy being by joint suit. We are inclined to think that the latter cases are the only ones excepted from the discretion given to the court to render a several judgment against one or more of the defendants, leaving the action to proceed against the others. This construction of the section harmonizes more fully with the general system of practice introduced by the code. So that the rule would seem to be that the court in its discretion, may render a judgment against one or more of the defendants, leaving the action to proceed against others, whenever it appears that the plaintiff might have demanded a several judgment on the contract if he had elected to sue the defendants separately. On the other hand in all cases where the subject-matter of the action is such that the plaintiff could not have prosecuted several actions, his only remedy being to demand a joint judgment in a joint action, he cannot have a several judgment against any of the defendants until the liability of each and all of the defendants has been determined upon final trial of all the issues in the case."[3]

For example, if in an action upon an alleged joint contract, it turns out upon the trial that only one or more of the joint obligees are liable thereon, judgment may be rendered against the one or more so found to be liable.[4] So, in an action against several defendants to recover possession of land, where they defend jointly, verdict and judgment may, on final trial be rendered for or against them ;[5] so is the liability of a stockholder in a corporation several, and judgment may be rendered against one or more ;[6] so is the liability of a drawer of a bill of exchange a several one, and enforceable by separate action allowing a several judgment in an action against drawer and acceptor, leaving

[1] See Hempy *v.* Ransom, 33 O. S. 312, 315.

[2] 23 O. S. 543.

[3] See McCoy *v.* Jones, 61 O. S. 119.

[4] Roby *v.* Rainsberger, 27 O. S. 674; Lampkin *v.* Chisom, 10 O. S. 451; Cloon *v.* City Ins. Co., 1 H. 32

[5] Humphries *v.* Huffan, 33 O. S. 395.

[6] Mason *v.* Alexander, 44 O. S. 318.

the action to proceed against the latter;[1] so may joint tort-feasors be sued separately as well as jointly, and a several judgment consequently rendered against all or part;[2] so also may judgment be rendered against the maker of a note, leaving the action to proceed against the indorser for service and judgment against him.[3]

The rule being, therefore, well settled that these sections can be followed, and several judgments rendered only when the claim is several,[4] it follows that where the obligation is strictly joint the action must be brought against all joint obligees, and a joint judgment must be rendered.[5] So in an action on a joint bond,[6] or upon a joint note,[7] the judgment must be joint. Where, however, the obligation is both joint and several, a several judgment may be had.[8] A judgment against only one of two joint obligees is a bar to an action against both,[9] or against the other.[10] But a judgment against one joint maker of a note is not a bar against the other who is a non-resident.[11] A judgment may be void as to some defendants for lack of jurisdiction and valid as to others.[12]

Sec. 811. Same, continued—Against defendants jointly indebted, —The two provisions mentioned in the preceding section. authorizing a judgment to be rendered against several defendants, leaving the action to proceed against others whenever a several judgment is proper,[13] should be considered in connection with another section of the code to the effect that, when service has been made on one or more defendants, but not on all, the plaintiff may proceed as follows: 1. If the action is against defendants jointly indebted upon contract, he may proceed against the defendants served, unless the court otherwise direct. 2. If the action is against defendants severally liable, he may, without prejudice to his rights against those not served, proceed

[1] Kilbourne *v.* Fury, 26 O. S. 153; Smith *v.* Bank, 26 O. S. 141; Bussing *v.* Scott, 2 W. L. B. 18.

[2] Reugler *v.* Lilly, 26 O. S. 48, 49. Such as may be proven guilty. Black on Judgments, sec. 207. See generally, 40 O. S. 313.

[3] Lennig *v.* Burgoyne, 1 Handy, 77.

[4] Bank *v.* Walters, 1 O. S. 202; Mason *v.* Alexander, 44 O. S. 318, 334; Kilbourne *v.* Fury, 26 O. S. 153; Aucker *v.* Adams, 23 O. S. 543.

[5] Aucker *v.* Adams, 23 O. S. 543; Voss *v.* Loomis, 1 O. C. C. 20; Carr *v.* Beckett, 1 O. C. C. 72; Black on Judgments, sec. 210; Freeman on Judgments, sec. 43.

[6] Aucker *v.* Adams, *supra.* Or on an assignee s bond by his successor (R. S., sec. 6341) the action must be joint. Voss *v.* Loomis, 1 O. C. C. 20.

[7] Carr *v.* Beckett, 1 O. C. C. 72.

[8] King *v.* Bell, 36 O. S. 460, 468; Sears *v.* McGrew, 10 Ore. 48.

[9] Reynolds *v.* Railway Co., 29 O. S. 602.

[10] Bank *v.* Hart, 5 O. S. 34.

[11] Yoho *v.* McGovern, 42 O. S. 11.

[12] Newburg *v.* Munshower, 29 O. S 617; Douglass *v.* Massie, 16 O. 271; Ash *v.* McCabe, 21 O. S. 181.

[13] R. S., secs. 5311, 5312.

against the defendants served.[1] It is said that this section was not intended to modify the common-law practice. In an action upon a joint contract, all who are jointly liable must be joined. In this respect the rule of the common law has not been changed by our code.[2] But the statute says that the plaintiff may proceed against the defendants served. To authorize such judgment summons should not only be issued but also returned "not found," and then only in those cases where the action is commenced by the filing of a petition and the issuing of a summons against all of the joint defendants.[3] Our supreme court has said that this provision did not change the common law, and have held that it is void against the parties not served, and voidable as against those served.[4] This, therefore, enables a party to obtain an effective judgment against part or several joint debtors, so long as those served do not object, which they may do, as it has always been the rule that one of several joint obligors had the right to insist on all being made parties. And to this end the code provides that when a determination of the controversy cannot be had without the presence of other parties, the court may order them to be brought in.[5]

It has been held by one of the circuit courts of the State that it is error for the court to render a several judgment on default against one of the defendants on a joint liability without first trying and determining the rights and liabilities of all the defendants touching such claim.[6] If one of the joint debtors die, his estate is liable upon the joint obligation as if it had been joint and several.[7] This abrogates the common-law rule that the death of one of the joint makers of an obligation extinguished all remedy at law against his estate.[8]

Sec. 812. Sale of mortgaged property.—The code requires that when a mortgage is foreclosed a sale of the premises shall be ordered.[9] It has been said that this provision prohibits strict foreclosure, and that only foreclosure and sale may be had.[10] The question may be raised thereunder, whether as the statute requires a sale of the premises to be ordered, such sale could be dispensed with and an execution be issued for the debt, and the same levied upon other property of the defendant.

[1] Sec. 5051.

[2] Bazell *v.* Belcher, 31 O. S. 572.

[3] Bazell *v.* Belcher, 31 O. S. 572.

[4] Newburg *v.* Munshower, 29 O. S. 617; Douglass *v.* Massie, 16 Oh. 271; Ash *v.* McCabe, 21 O. S. 181.

[5] Sec. 5013.

[6] Osbun *v.* Bartram, 15 O. C. C. 224; s. c., 8 Oh. Dec. (Cir.) 259. The court in rendering this decision evidently did not consider section 5044, R. S.

[7] R. S., sec. 6102.

[8] Burgoyne *v.* Ins. & Trust Co., 5 O. S. 586.

[9] Code, sec. 5316.

[10] Kerr *v.* Lydecker, 51 O. S. 240, 250.

A proceeding to foreclose a mortgage has been said to be, in one sense, one *in rem*, and also *in personam*, "as it seeks to charge the defendant with a debt; that an account has to be taken against the defendant before the property can be subjected, and the account thus found becomes a debt of record against the defendant after the mortgaged property is exhausted, and now the decree may be so framed that after the mortgaged property is exhausted, execution can be issued on the decree for the residue found due, as on judgments at law."[1] It is only when personal judgment is asked that it is, strictly speaking, considered a proceeding *in personam*, although it is, as above stated, necessary in all cases to take an accounting of the amount due. An execution for any residue after the property is exhausted, can only be issued when personal judgment has been asked and rendered. No such judgment can be rendered unless it is prayed for.[2] And it was held before the code that it was improper to render personal judgment for the debt in the first instance, but only for the unsatisfied balance.[3] It would seem that as a sale of the premises must in the first instance be ordered that an order of sale should be issued and the proceeds arising therefrom be exhausted before an execution can be issued, and then only for the unsatisfied amount.

Sec. 813. Foreclosure of mortgage made in another State.—The rule is well settled that a contract made in one State to be performed in another, will be enforced in such other State and construed according to the law of the State where made, so long as it is not contrary to the public policy of the State where it is sought to be enforced, nor particularly prejudicial to the citizens thereof. This general rule is applicable to the foreclosure of a mortgage, which is a contract. Consequently, if the mortgage was made contrary to the laws of the State where executed and to be performed, and it cannot be enforced without violating the laws of such State, foreclosure cannot be decreed.[4]

Sec. 814. Sale of mortgaged property, continued — Decree should fix days of grace.—The court may, in its decree of foreclosure, fix days of grace, that is, name a day within which the defendant is required to pay the amount found due into court. Our courts have held it to be an irregularity to direct a sale of the premises absolutely, without any time being given to the mortgagor to make payment, that a time should be appointed

[1] Moore *v.* Starks, 1 O. S. 369, 375; Hamilton *v.* Jefferson, 13 Ohio, 427; Myers *v.* Jewett, 16 Ohio, 449, 456.

[2] Giddings *v.* Barney, 31 O. S. 80.

[3] Hubbell *v.* Broadwell, Wright 248.

[4] Evans *v.* Beaver, 3 O. C. C. 47.

for this purpose, and the sale ordered in the event of failure.[1] The matter of allowing time within which payment shall be made by the defendant, however, is entirely within the discretion of the court,[2] and must be exercised wisely according to the circumstances. Some cases may require a longer time than others.[3] And the court has the discretionary power to extend this time if the security will not be imperiled.[4]

Sec. 815. Sale of mortgaged property, continued—When premises are in one or more tracts.—When the premises to be sold are in one or more tracts, the court may direct the officer who makes the sale to subdivide, appraise, and sell the same in parcels, or to sell any one of the tracts as a whole.[5]

Sec. 816. Sale of mortgaged property, continued—Property situated in more than one county—How sold, appraised, &c.—When the mortgaged property is situated in more than one county the court may order the sheriff, or master, of each to make sale of the property in his county, or may direct one officer to sell the whole; the court may direct that the property, when it consists of a single tract, be sold as one tract, or in separate parcels, and shall direct whether appraisers shall be selected for each county, or one set for all; and shall also direct whether publication of the sale shall be made in all the counties, or in one county.[6]

Sec. 817. Judgment may operate as a conveyance.—A judgment or decree for a conveyance, release, or acquittance may be so framed under the code that the party against whom it is rendered shall be required to comply therewith within a certain time named, and if not so complied with, it shall have the same operation and effect, and be as available, as if the conveyance or release had been executed conformably to such judgment.[7] This provision does not take away the jurisdiction of the court to enforce the execution of a conveyance.[8] A court of equity having jurisdiction of parties, may decree the specific performance of a contract in relation to lands in another State; and such decree is binding upon the conscience of the parties, although it cannot operate as a transfer in such case.[9] And the court under the authority of this statute may enforce a trust.

[1] King *v.* Longworth, 7 Ohio, 231, (Pt. 2).
[2] West *v.* Morris, 2 Disney, 415.
[3] Owen *v.* Miller, 10 O. S. 136, 148.
[4] Stagg *v.* Harrison, 2 C. S. C. R. 23.
[5] Code, sec. 5316.
[6] Code, sec. 5317.
[7] Code, sec. 5318.
[8] Randall *v.* Pryor, 4 O. 425.
[9] Burnley *v.* Stevenson, 24 O. S. 474.

Sec. 818. Judgment against married women.—Judgment may now be rendered and enforced against a married woman, as if she were an unmarried woman.[1] The amendment to the code did not in any particular vary or enlarge the liabilities of a married woman.[2]

Sec. 819. Judgment upon default.—The statute authorizes default judgment to be taken when "all or a part of one or more of the causes of action are not put in issue by answer." There is no prejudice as to that portion disputed.[3]

The question of most importance under this provision is in what causes default may be taken, and how can a default judgment be made effective. The statute authorizes the court, when necessary, to take an account, hear proof, or assess damages, or refer the case to a referee, master, or direct the matter to be found by a jury, as the case may require.

This statute has no application to an entire demand. It is applicable to cases where one or several causes of action are admitted by failure to plead, or a claim is made on an account consisting of several items, some of which are admitted and others are denied.[4]

It has been considered that judgment by default may be taken upon an account without taking proof.[5]

Default judgments are probably limited to cases where the cause of action is founded on contract, express or implied.[6] But where in an action brought for the value of services rendered, there is an admission of the rendition of the services with a denial that they were worth the value claimed, and an averment that they were worth a stated claim, the court cannot render a judgment for the amount specified by the defendant, and continue the cause for trial to ascertain the further value of the services.[7]

A decree in chancery cannot be taken on minor defendants on default for answer. The case must be established by proof;[8] nor can a decree be entered against a lunatic, as on petition confessed, without answer from his guardian *ad litem*. Such a

[1] Code, sec. 5319.

[2] Hill *v.* Myers, 46 O. S. 183.

[3] Code, sec. 5320.

[4] White *v.* Herndon, 15 O. C. C. 290.

[5] Dallas *v.* Ferneau, 25 O. S. 635, 638.

[6] Pollock *v.* Pollock, 2 O. C. C. 143; s. c., 1 Oh. Dec. (Cir.) 410.

[7] Weaver *v.* Carnahan, 37 O. S. 363, distinguishing Moore *v.* Woodside, 26 O. S. 537, in this that the latter applies only to a cause where a part of a cause or causes of action is admitted and a part denied, and where an answer admits the amount of his indebtedness to plaintiff and pleads a set-off, and issue is joined on the set-off, a judgment can be rendered for plaintiff upon the pleadings on his motion for the amount admitted to be due less the set-off. Benson *v.* Stein, 34 O. S. 294.

[8] Massie's Heirs *v.* Donaldson, 8 O. 377.

decree cannot be taken even if the court had heard evidence as to complainant's claim. Such evidence would be heard out of time.[1] In a cause where judgment is rendered by default, before the expiration of the day named in the summons for answer, such judgment can be reversed on error. The remedy to correct the error is not a proceeding in the common pleas under the code to vacate the judgment. It is provided by statute that at least twelve days before the first day of each term the clerk shall make a trial docket setting down the cause at issue for trial on particular days. If judgment is taken by default before answer, the cause cannot be rightly on the docket, and such judgment may be reversed on error.[2] In an action brought to rescind a contract and for the recovery of purchase money, a judgment by default without proof cannot be entered.[3] A judgment rendered by default against bail, where fifteen days had not intervened between the service and return of the writ of *scire facias*, but that time had elapsed before the judgment was entered on the journal, constitutes error.[4] If a motion which is frivolous and without merit be filed before answer day and judgment by default on the petition be entered, the rendition of such judgment without a disposition of the motion, does not constitute an error.[5]

Sec. 820. Effect of taking default judgment for less than due.—In an action wherein the party by his own carelessness and mistake takes a judgment by default for an amount less than his claim, he is not permitted, in a new action, to ask for the remainder. If this were permitted, a litigant would be allowed to take advantage of his own carelessness It is not permitted because it is the policy of the law to enforce vigilance in the preparation and the trial of causes.[6]

Sec. 821. Opening default judgment.—It is the usual practice of courts in this State, before setting aside default judgments to require a showing of a meritorious defense and the payment of costs incident to the setting aside of such judgment; and the question of granting leave to plead on default for answer is discretionary with the court. This discretion, however, is a legal discretion and the court is bound by fixed legal principles. But reviewing courts seldom undertake to review this discretion.[7]

[1] Sturges *v.* Longworth, 1 O. S. 545, 547.

[2] Williamson *v.* Necklin *et al*, 34 O. S. 123. See also Hearn *et al v.* State, 5 W. L. J. 511.

[3] Heck *v.* Jenney, 1 Clev. R. 90.

[4] Lyon *v.* Randall, 1 W. L. J. 396.

[5] Kellogg *et al v.* Churchill *et al*, 1 W. L. M. 45.

[6] Ewing *v.* McNairy, 20 O. S. 315.

[7] Halliday *v.* Bank, 57 O. S. 647.

Sec. 822. Judgment by confession.—A person indebted, or against whom a cause of action exists, may personally appear in a court of competent jurisdiction, and with the assent of a creditor, or a person having such cause of action, confess judgment, and such judgment shall be entered accordingly.[1] But in all such causes, the debt or cause of action, shall be briefly stated in the judgment or in a writing to be filed as a pleading in other actions.[2]

The foregoing provisions apply only to all proceedings wherein the debtor appears in court in person and without pleadings filed in the case openly confesses judgment.[3] But personal appearance is not necessary where an answer is filed, admitting the indebtedness set forth in the petition.[4]

The debt or cause of action is briefly stated in the judgment, or in a writing filed.[5]

All judgments of this kind authorize the same proceedings for their enforcement as judgments rendered in actions regularly brought and prosecuted; and confession operates as a release of error.[6]

Sec. 823. Judgments on warrants of attorney.—An attorney who confesses judgment in any case is required, at the time of making such confession, to produce the warrant of attorney for making the same to the court before which he makes the confession. The original or a copy of the warrant must be filed with the clerk of such court when the judgment is taken.[7] This provision of the code as to taking judgment by confession on warrant of attorney, authorizing a waiver of process and release of all errors, and a good cause of action is set forth in a petition not properly verified, the improper verification will be deemed to have been waived.[8]

The questions arising on the right of a holder of a note with warrant of attorney authorizing confession of judgment has, in this State, given rise to many questions, but it seems that the questions have been well settled and fixed rules determined upon. These questions will be discussed in so far as they relate to the taking of judgment on a warrant of attorney. The cases all hold that these warrants of attorney to confess judgment must be strictly construed, and the authority conferred cannot be exercised beyond the limits expressed in the instrument. No omission or defect in its terms can be aided by liberal intendment or construction.[9]

[1] R. S., sec. 5322.
[2] R. S., sec. 5322.
[3] Rosenbrough *v.* Ansley, 35 O. S. 107.
[4] Hart *v.* Sarvis, 3 O. N. P. 316.
[5] Sec. 5322.
[6] R. S., sec. 5323.
[7] R. S., sec. 5324.
Bank *v.* Reed, 31 O. S. 435.
[9] Cushman *v.* Welsh, 19 O. S. 536; Spence *v.* Emerine, 46 O. S. 433.

In an early case the supreme court held that it was a question whether judgment for the indorsee could be entered by confession on a note payable to the payee or order, with warrant of attorney authorizing judgment *in favor of any* holder of this obligation.[1]

A note made payable to R., or order, with warrant of attorney attached, authorizing confession of "judgment in favor of the legal holder," does not give authority to one to whom it was not indorsed, power to obtain judgment by confession.[2] Such a note made payable to bearer and authorizing confession of "*judgment in favor of the holders of said note*," will give a legal owner to whom the note is delivered power to obtain judgment by confession, though the note was not indorsed to him;[3] but a note made payable to bearer with warrant of attorney for confession of "judgment against us for the amount due thereon" will not authorize one not the payee, but the legal owner and holder by delivery only, to secure judgment by confession.[4]

A judgment by confession cannot be taken on a warrant to confess judgment until after due, and if judgment be taken before due, the judgment can be set aside.[5] In all cases where judgment is taken on notes of this kind there should be filed with it the original warrant or the copy, for if this be not done it will be an irregularity for which the judgment may be set aside.[6]

The erasure of the name of a surety on a promissory note or bill of exchange with a warrant of attorney attached, where the alteration is not suspicious, and is free from fraud, and beneficial to the person seeking to enforce it, is not such an alteration as will invalidate the instrument, and it seems that such warrant to confess judgment executed by the principal and surety on such note or bill, although in terms authorizing a joint judgment against principal and surety, may be a good power to take a judgment against the surety alone.[7]

All warrants of attorney executed by persons in custody must, in order to authorize confession of judgment on them in favor of the person at whose suit he is in custody, be executed in the presence of an attorney expressly named by the person in custody and signed by him as a witness.[8]

Sec. 824. Judgment upon verdict.—The code provides that in cases tried to a jury judgment shall be entered by the clerk in

[1] Marsden *v.* Soper, 11 O. S. 503.
[2] Cushman *v.* Welsh, 19 O. S. 536, 539.
[3] Clements *v.* Hull, 35 O. S. 141.
[4] Spence *v.* Emerine, 46 O. S. 433.
[5] Spier *v.* Corll, 33 O. S. 236.
[6] Bank *v.* Doty, 9 O. S. 506.
[7] Huntington *et al v.* Finch *et al*, 3 O. S. 445.
[8] R. S., sec. 5325.

conformity to the verdict, unless the verdict is special, or the court order the case to be reserved for future argument or consideration.[1] When the verdict is special, or when there is a special finding on particular questions of fact, or when the case is reserved, the court shall order what judgment shall be entered.[2] When a verdict is returned by a jury, the clerk merely makes an entry of the return of the verdict, and what the verdict is, and of the filing of a motion for a new trial. When the motion for a new trial is passed upon counsel for the prevailing side prepares the entry, which is either of judgment, or setting aside the verdict and ordering a new trial. The clerk may enter judgment on the verdict even though the time for filing a motion for a new trial has not expired.[3]

Sec. 825. Judgment non obstante veredicto.—When, upon the pleadings, one party is entitled by law to judgment in his favor, judgment should be so rendered by the court, although a verdict has been found against such party.[4] It is only when there is no cause of action, or defense, counter-claim, or set-off, that the court can render judgment notwithstanding the verdict. So, if there is a legal cause of action, however imperfectly or defectively stated, it is sufficient to support a judgment rendered thereon after verdict.[5] Judgment must be rendered for the defendant, notwithstanding the verdict against him, if the plaintiff's petition does not set forth a good cause of action; and the objection may be taken on error, as well as by motion in arrest, or by demurrer.[6] Where the only issue in a case is upon the truth of immaterial matter, it is not error in the court to render judgment upon the pleadings, irrespective of the verdict of the jury.[7] Courts in rendering this kind of a judgment are confined to a consideration of the statements in the pleadings; the record outside of the statements in the pleadings should not be considered.[8] After verdict for defendant on the cause of action set out in the petition, plaintiff cannot have judgment *non obstante verdicto*, on a new and different cause of action disclosed in the answer.[9]

Sec. 826. When defendant may have judgment.—When a counter-claim or set-off, established at the trial, exceeds the plaintiff's claim so established, judgment for the defendant must

[1] Code, sec. 5326.
[2] Code, sec. 5327.
[3] Young *v.* Shellenberger, 53 O. S. 291.
[4] Code, sec. 5328.
[5] Nott *v.* Johnson, 7 O. S. 270.
[6] Trimble *v.* Doty, 16 O. S. 119, 129.
[7] Tootle *v.* Clifton, 22 O. S. 247.
[8] McCoy *v.* Jones, 61 O. S. 119; Challen *v.* Cincinnati, 40 O. S. 113.
[9] Beetz *v.* Strobel, 6 Oh. Dec. 143.

be given for the excess; or, when it appears that the defendant is entitled to any affirmative relief, judgment shall be given therefor.[1]

Sec. 827. Vacation of judgment for fraud.—As stated elsewhere[2] the remedy provided by the code for the vacation or modification of a judgment for fraud practiced by the successful party is merely cumulative, and does not in any way abridge or limit the right to an original action to impeach and annul a judgment for fraud. The court of common pleas being a court of general jurisdiction, may independently of the code, set aside and vacate a judgment procured by fraud in an original action for that purpose.[3] A petition, setting out in detail the facts alleged as constituting a fraud by which a judgment is procured, and showing that a fraud was in fact successfully practiced, with a prayer that the judgment so procured be vacated and set aside, is sufficient as against a general demurrer.[4]

Sec. 828. The date of judgment.—The date of a judgment is a material part thereof, and when the entry gives an erroneous date of its rendition, a correction may be made by the court on application, and notice in writing to the adverse party.[5]

[1] Code, sec. 5329.

[2] *Ante*, sec. 82.

[3] Howenstine *v.* Sweet, 13 O. C. C. 239; Darst *v*, Phillips, 41 O. S. 514.

[4] *Id.*

[5] Warrington *v.* Mfg. Co., 18 O. C. C. 311. The procedure is under R. S., sec. 5354.

CHAPTER XXXVIII.

DISMISSAL OF ACTIONS WITHOUT PREJUDICE.

SEC.
829. Dismissal of action without prejudice.
830. By plaintiff before final submission.
831. Where plaintiff fails to appear.
832. For want of necessary parties.
833. On failure to prosecute some defendants.
834. For disobedience of an order.
835. In vacation on payment of costs.
836. When dismissal does not affect defendant's claim.
837. For failure to secure costs.
838. Where representative capacity has ceased.
839. Dismissal of suit for infant.
840. Order of dismissal.

SEC. 829. Dismissal of action without prejudice.—The statute prescribes six grounds or instances when an action may be dismissed without prejudice to a future action. In all other cases the decision must be upon the merits, upon the trial of the action.[1] Judgment as upon non-suit is a decision upon the merits, though it was not so under the former practice.[2]

SEC. 830. By plaintiff before final submission.—The plaintiff, before final submission of a case to the jury, or to the court, may dismiss his case without prejudice.[3]

In an action for an injury on account of negligence, when a demurrer is sustained to the petition, with leave to amend, and the judgment of dismissal entered, a plaintiff can discontinue his action and the discontinuance will not be a bar to a new action for the same cause.[4] On an appeal from the decision of the court in sustaining a demurrer, a second amended petition is filed and an answer thereto, to which answer demurrer is interposed and overruled and the petition dismissed, it is in the sound discretion of the court whether to grant leave to file an amended petition, or to grant leave to reply, or to dismiss the action without prejudice under the statute.[5] In a cause, where on trial, the court, in its discretion, allowed a plaintiff who had failed to prove his case, time to get other testimony on the following day, it was held no error to refuse to allow plaintiff to dismiss the case without prejudice.[6]

[1] Code, sec. 5314.
[2] *Ante*, secs. 652, 653.
[3] Sec. 5314.
[4] McGatrick *v.* Wason, 4 O. S. 566.
[5] Beaumont *et al v.* Herrick, 24 O. S. 445.
[6] Crowly *v.* Chamberlain, 9 Rec. 376.

Sec. 831. Where plaintiff fails to appear.—An action may be dismissed without prejudice, by the court, where the plaintiff fails to appear on the trial.[1]

Sec. 832. For want of necessary parties.—An action may be dismissed without prejudice, by the court, for the want of necessary parties.[2]

The city is a proper party in a suit against the county treasurer, asking for an order restraining the collection of an assessment for the improvement of one of the streets of such city. The court should order the city to be made a party, and a failure to comply with such order is a ground for dismissal of the action.[3] The court may dismiss a suit in injunction because of unreasonable neglect of the plaintiff to have defendants served.[4]

Sec. 833. On failure to prosecute some parties.—The court may dismiss an action without prejudice, on application of some of the defendants, where there are others whom the plaintiff fails to prosecute with diligence.[5]

Sec. 834. For disobedience of an order.—There may be a dismissal of an action without prejudice for disobedience by the plaintiff of an order concerning the proceedings in the action.[6] The court may under this provision dismiss an action for personal injuries, where the plaintiff fails to comply with an order to submit his person to an examination by a physician.[7]

Sec. 835. In vacation on payment of costs.—An action may be dismissed by the plaintiff, in vacation, on payment of costs, which takes effect upon entry thereof on the journal by the clerk.[8]

Sec. 836. When dismissal does not affect defendant's claim.—The statute regulating dismissal of actions specially exempts cases in which a counter-claim or set-off has been pleaded.[9] A plaintiff in such case cannot dismiss the action so as to prevent trial upon the counter-claim or set-off.[10] Of course, if the answer does not present a claim upon which the defendant has the right to have affirmative relief, the action may be dismissed.[11]

[1] Code, sec. 5314.
[2] Code, sec. 5314.
[3] Stone *v.* Viele, 38 O. S. 314.
[4] Krug *v.* Bishop, 44 O. S. 221.
[5] Code, sec. 5314.
[6] Code, sec. 5314.
[7] Turnpike Co. *v.* Baily, 37 O. S. 107.
[8] Code, sec. 5314.
[9] Sec. 5314.
[10] Wiswell *v.* Cong. Church, 14 O. S. 31.
[11] Bank *v.* Weyand, 30 O. S. 126.

The plaintiff in an action to contest a will, cannot dismiss the same so as to prevent trial upon an answer of a defendant who joins in the prayer.[1]

Sec. 837. For failure to secure costs.—If security for costs be not given in a cause, when required by the court in compliance with the statute,[2] the court is required at any time before trial, on motion of defendant, and notice to plaintiff, to dismiss the action unless within a reasonable time, allowed by court, security be given ;[3] and in an action in which security is required and has been given, the defendant may, on notice, move the court for additional security, and if the court is satisfied that the security has removed from the State, or is not sufficient, the action may be dismissed, unless, in a reasonable time to be fixed by the court, sufficient security be given.[4]

Sec. 838. Where representative capacity of party has ceased.—An action by or against one in a representative capacity may be stricken from the docket, by the court, when it appears by affidavit that the powers of the representative have ceased, or either party has been dead for so long that the action cannot be revived without the consent of both parties.[5] At any term of court succeeding the death of a plaintiff, while the action remains on the docket, the defendant by giving to plaintiff's representatives, in whose names the action might be revived, ten days' notice of the application, may have an order to strike the action from the docket, and for costs against the estate of the plaintiff, unless the action be revived.[6]

Sec. 839. Dismissal of suit for infant.—A suit brought for an infant by his next friend, may be dismissed by the court, if it is not for the benefit of the infant.[7]

Sec. 840. Order of dismissal.—An entry ordering that a cause be dismissed must be made to effect a dismissal. An order to the effect that an action stand dismissed, if the same is not complied with, is not self-executing. A further entry actually dismissing the action has to be made when the order is not complied with.[8]

[1] Bradford *v.* Andrews, 20 O. S. 208.
[2] R. S., sec. 5341.
[3] R. S., sec. 5341.
[4] R. S., sec. 5343.
[5] R. S., sec. 5159.
[6] R. S., sec. 5160.
[7] R. S., sec. 4998.
[8] Railway Co. *v.* Construction Co 49 O. S. 681.

CHAPTER XXXIX.

COSTS.

SEC.
841. Costs—Historical.
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843. Security, how furnished.
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846. The statute controls judgment in what cases.
847. When plaintiff cannot recover costs.
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851. Costs taxable to party granted leave to amend.
852. In case of offer to confess judgment.
853. Attorney's fees as part of the costs.
854. Next friend liable for costs.
855. Compensation of guardian *ad litem* taxable as costs.
856. Costs in trials to referees or masters.
857. In proving genuineness of signature.
858. In action for dower.
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860. In *habeas corpus*.
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862. In *quo warranto*.
863. In cases of occupying claimants.
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865. In replevin.
866. Costs on appeal.
867. Costs on error.

SEC. 841. Costs—Historical.—The term "costs" has a legal signification and includes only such costs as are properly taxable by statute.[1] Costs were unknown at common law. They are given only by statute, and may be changed, or entirely taken away, at the will of the legislature.[2]

At common law a party was never entitled to judgment for costs, but only for his right or claim for which the action was brought, or "to go hence without day." But if plaintiff failed to maintain his alleged cause of action, he was amerced *pro falso clamore*.[3]

SEC. 842. When security must be given.—The plaintiff, if a non-resident of the county in which the action is brought, or a partnership suing by its company name, or a corporation when insolvent, are required to furnish sufficient security for costs. Administrators or executors having given bond as such are relieved from giving security in actions prosecuted by them in the county in which they have been appointed.[4] The action of the

[1] McDonald *v.* Page, Wright, 121.
[2] Farrier *v.* Cairns, 5 Ohio, 45. 48.
[3] The C. C. C. R. R. Co. *v.* Bartram. 11 O. S. 457, 467. See *Id.*, 469 (pauper plaintiff to pay costs or be whipped), 2 Black. 399.
[4] Code, sec. 5340.

court under this provision is invoked by a motion, and the order is made as matter of course. If the security is not given as required the court is authorized at any time before trial, and upon motion of defendant to dismiss the action.[1]

A plaintiff who becomes a non-resident during the pendency of an action may be required to furnish security.[2] Additional security may be required where that furnished is insufficient.[3]

Sec. 843. Security how furnished.—The surety must reside in the county where the action is instituted, and the same must be approved by the clerk ; he may sign or indorse the petition or summons, or indorse his obligation upon the docket. The plaintiff may, instead of furnishing a surety, deposit a sum of money with the clerk.[4]

Sec. 844. Surety liable for what costs.—A surety is liable under the statute for the costs which the defendant may recover against the plaintiff, and for the costs of the plaintiff's own witnesses, without regard to the judgment that may be rendered.[5]

Sec. 845. Judgment against surety.—The final judgment carries with it the costs against the defeated party, but special judgment for the costs must be rendered against the surety; and this may be done upon motion of the defendant, or of a person having the right to costs. Ten days' notice of such motion must be given.[6]

Sec. 846. The statute controls judgment in what cases.—When it is not otherwise provided by statute, costs are allowed of course to the plaintiff, upon a judgment in his favor in actions for the recovery of money only, or for the recovery of specific real or personal property.[7] This embraces only actions at law. When a defendant disclaims title or interest in lands or other property, the subject of an action, he may recover costs, unless for special reasons, the court adjudge otherwise.[8] Costs are allowed, of course, to any defendant upon a judgment in his favor in the foregoing actions.[9] Judgments for costs in chancery, by reason of their omission in the statutes, are still left to the discretion of the court.[10] But the statute requires that : "In all actions, motions and proceedings, in any of the courts in the State, the costs of the parties shall be taxed and

[1] Code, sec. 5341.
[2] Code, sec. 5342.
[3] Code, sec. 5343.
[4] Code, sec. 5340.
[5] McKenzie *v.* Horr, 15 O. S. 478.
[6] Code, sec. 5344.
[7] Code, sec. 5348.
[8] Code, sec. 5346.
[9] Code, sec. 5350.
[10] W. 95; W. 321; 18 O. S. 184.

entered separately."[1] The reason for this provision is probably because each party is liable for his own costs, and while the prevailing party may have judgment for his costs expended, if they are not paid by the party against whom judgment is rendered, recovery may be had from the other party.

Sec. 847. When plaintiff cannot recover costs.—The plaintiff cannot recover costs in the common pleas court where the amount is below the jurisdiction of that court. And in certain cases—libel, slander, malicious prosecution, etc., when the damage assessed is under five dollars, there can be no recovery for costs.[2] But if the amount claimed is within the jurisdiction of the court, but is reduced by a counter-claim, costs may be recovered.[3]

Sec. 848. When costs awarded in the discretion of the court.—In cases other than for money only or for the recovery of real or personal property, or those not specially provided for, the court may award and apportion costs between parties, on the same or adverse sides, as it may adjudge to be right and equitable.[4] This is the statutory rule in all cases under the code in the nature of proceedings in equity.[5] Under this section, where parties have settled the cause before judgment, without providing for costs, the court may award the same as it deems right.[6] Costs of motions, continuances, amendments and the like, are within the discretion of the court.[7]

The discretion conferred upon the court to award costs is not unlimited, but a reasonable discretion, which is reviewable on error.[8]

Sec. 849. Judgment for costs.—"On the rendition of judgment, in any cause, the costs of the party recovering, together with his debt or damages, shall be carried into the judgment; and the costs of the party against whom judgment is rendered shall be stated in a separate clause of the record, or docket entry."[9]

It has been held that under this provision (and that is what the language imports), that the party recovering cannot have included in his judgment the costs made by the adversary party,

[1] R. S., sec. 1318.
[2] Code, sec. 5349.
[3] Beaton *v.* Radford, 40 O. S. 106; *cf.* Butler *v.* Kneeland, 23 O. S. 196.
[4] Code, sec. 5351.
[5] Rabb's Estate, 16 O. S. 274, 278.
[6] Standard Oil Co. *v.* Railway Co., 7 O. C. C. 442.
[7] Code, sec. 5347.
[8] State *ex rel v.* Davis, 18 O. C. C. 479.
[9] R. S., sec. 1319.

and where they are so included, the judgment, as to such costs, may be reversed.[1]

Judgment then, is only entered for the costs which the prevailing party has incurred to secure his rights; the statute does not in terms say that the costs of the defeated party are to be carried into the judgment, but into "the record, or docket entry."

The right to recover a judgment for costs is not given to the successful party, because he has paid the taxable fees which were earned at his instance, or because he is supposed to have paid them, but because he is liable to pay them at the suit of those who earned them, if he has not in fact done so. The judgment is given for the purpose of reimbursement to the extent he may have paid fees, and for the purpose of indemnity to the extent he may be liable to pay them in the future.[2]

Where the amount of costs in the judgment is left blank, and afterward taxed by the clerk, a sale made under the judgment is not thereby rendered void.[3] The judgment for costs draws interest from the date of the original judgment to the time of recovery.[4]

The rule in chancery was that the court had the discretion to settle the costs,[5] and it has been held since the code that in a proceeding against a mortgagee for an account, that the court may adjudge as to costs, as in its discretion, it deems right and equitable.[6] The judgment of the party recovering for his debt or damages, is probably separate from that for costs; parties may settle the former, leaving the latter stand, which may become dormant as other judgments. Judgment for costs is a lien upon the land of the debtor as are other judgments.[7]

Sec. 850. When court is without jurisdiction.—It is well settled that a court having no jurisdiction of a cause can only strike the same from the docket, and can give no judgment whatever for costs.[8] Costs upon a proceeding in error to reverse such a judgment should be adjudged against the plaintiff in error.[9]

Sec. 851. Costs taxable to party granted leave to amend.—The matter of awarding costs when parties amend their pleadings is

[1] Russell *v.* Giles, 31 O. S. 293; Bliss *v.* Long, 5 Ohio, 276.

[2] Abbey *v.* Fish, 23 O. S. 403, 413.

[3] Wilkins *v.* Huse, 9 Ohio, 154.

[4] Emmitt *v.* Brophy, 42 O. S. 82.

[5] Walpole *v.* Griffin, W. 95; Campton *v.* Griffith, W. 321.

[6] Armstrong *v.* McAlpin, 18 O. S. 184.

[7] Stuble *v.* Walpole, W. 447, 448.

[8] Rothwell *v.* Winterstein, 42 O. S. 249; Wilson *v.* Holeman, 2 Ohio, 254; 4 Ohio, 200; Wright, 417; Norton *v.* McLeary, 8 O. S. 205, 210; Burke *v.* Jackson, 22 O. S. 268, 270; Moore *v.* Boyer, 42 O. S. 312.

[9] Burke *v.* Jackson, *supra;* Moore *v.* Boyer, 42 O. S. 312.

largely within the discretion of the court, in some cases entirely so. When a party is allowed to amend after demurrer sustained, the court may allow the adverse party to amend, with or without costs, as the court in its discretion directs.[1] Costs incurred on motions, continuances, amendments and the like are taxed as the court may direct.[2] The court may order an immediate amendment without costs in the case of an immaterial variance.[3] If costs have been ordered paid by a party obtaining leave to amend his pleadings, they should not be afterwards taxed and included in the final judgment.[4]

Sec. 852. In case of offer to confess judgment.—If, before an action for the recovery of money is brought, defendant offers to confess judgment under the statute, and the party refuses to accept the same and fails to recover more than the amount so offered to be confessed and the interest thereon from the date of offer, no recovery can be had for costs.[5]

If an amount found due the plaintiff be greater than the amount of an offer made by defendant, the former is not liable for the latter's costs, notwithstanding the sum adjudged due when reduced by set-off, is less than the amount named in the offer.[6]

Sec. 853. Attorney's fees—As part of the costs.—Attorney's fees are not considered or taxed as part of the costs in any case unless by virtue of some statute. The term costs includes only taxable costs, and not attorney's fees.[7]

The court, having regard to the interest of the parties, and the benefit each may derive from a partition, and according to equity, shall tax the costs and expenses which accrue in the action, including reasonable counsel fees, which shall be paid to plaintiff's counsel, unless the court award some part thereof to other counsel for service in the case for the common benefit of all the parties, and execution may issue therefor, as in other cases.[8] A fee for services rendered by counsel in resisting the application for partition cannot properly be allowed as part of the costs and expenses.[9] A reasonable fee may be allowed counsel appointed in proceedings to perpetuate testimony.[10] In proceedings in error when the judgment is affirmed, there shall be taxed, as part of the costs in the case, a reasonable counsel

[1] Code, sec. 5116.
[2] Code, sec. 5347.
[3] Code, sec. 5295.
[4] Kellogg *v.* Graham, W. 87.
[5] Code, sec. 5139.
[6] Tipton *v.* Tipton, 49 O. S. 364.
[7] Savings and Loan Co. *v.* Sennt, 4 O. N. P. 346; Richter *v.* Schoenfeldt, 1 W. L. B. 133; McDonald *v.* Page, W. 121.
[8] R. S., sec. 5778.
[9] Lowe *v.* Phillips, 21 O. S. 657.
[10] R. S., sec. 5876.

fee, to be fixed by the court, not less than twenty-five dollars. But the fee is not taxed if the court certify in its judgment that there was reasonable cause for the proceeding in error.[1]

Counsel fees in a suit to determine the liability of stockholders is an expense incident to the cause, and should be charged to the fund.[2] Counsel fees expended by parties may be considered as part of estimated damages, as in an action on a bond of an officer.[3]

Where an attorney has recovered judgment for his client without a special agreement, he should estimate the service he has performed and the price usually paid to the profession for such service, and that will be the amount of his compensation.[4]

An attorney has a lien upon his client's papers and documents in his possession, for expenditures in the cause, and also for a general balance due on account of costs. He has also a lien upon a judgment obtained by him for the advancements and disbursements made by him in the progress of the cause, and such fees as are included in the bill of costs.[5]

Sec. 854. Next friend liable for costs.—The statute provides that the next friend shall be liable for costs in an action brought by him; if insolvent, the court may upon motion require security.[6]

Sec. 855. Compensation of guardian ad litem taxable as costs.—The court is required to fix the compensation of a guardian *ad litem*, which is taxed as part of the costs in the case against a minor or insane person.[7]

Sec. 856. Costs in trials to referees or masters.—Referees are allowed such compensation for their services as the court deems proper, which is taxable as part of the costs.[8] And master commissioners or special masters are allowed the same fees as are allowed to other officers,[9] which are taxed in as part of the costs before distribution of a fund is made.[10]

A master commissioner or other party entitled to have fees taxed as costs in an action, cannot in his own name prosecute a proceeding in error to reverse an order of the court for retaxing the costs, or disallowing his claim for fees in the case.[11]

[1] Code, sec. 6712.
[2] Wehrman *v.* Reakirt, 1 C. S. C. R. 230, 240.
[3] Finchk *v.* Evers, 25 O. S. 82.
[4] Christy *v.* Douglas, W. 485.
[5] Longworth *v.* Handy, 2 Dis. 75 (1858).
[6] Code, sec. 4999.
[7] Code, sec. 5001.
[8] Code, sec. 5218.
[9] Code, sec. 5224.
[10] Timmonds *v.* Wheeler, 12 O. C. C. 19.
[11] Fiedelday *v.* Diserens, 26 O. S. 312.

But in *Lampton v. Nichols*[1] it was held that, where the judge failed to include in the judgment the fees of the referee, the latter might at a subsequent term move the court to modify the judgment as to costs and allow a reasonable fee and order the plaintiff to pay it.[2]

Sec. 857. In proving genuineness of signature.—Where a party refuses to admit the genuineness of a paper writing which is afterwards proven, the party so declining may be charged with the costs and expense in proving the same, unless it appears to the satisfaction of the court, that there were good reasons for the refusal.[3]

Sec. 858. In action for dower.—If resistance be made to a petition of a person claiming dower, but without success, the party so resisting is liable for all the costs of suit; but if no resistance is made, the plaintiff must pay one-third, and the legal owner two-thirds thereof.[4]

Sec. 859. Costs of filing transcript of judgment of justice for a lien.—The costs of the transcript of the judgment of a justice of the peace, and the filing thereof with the clerk of the court of common pleas, and of the entry on the docket, must be paid by the party who files the same, and taxed as increased costs, unless the judgment debtor pay the same, give bail for stay of execution, or appeal from the judgment.[5]

Sec. 860. In habeas corpus.—The statute provides that in the final disposition of the case, the court or judge may make such order as to costs as the case requires.[6]

The fees of officers and witnesses shall be taxed by the judge, on his return of his proceedings on the writ, and shall be collected as part of the original costs in the case, and when the prisoner is discharged, the costs shall be taxed to the State. But no officer or person shall have the right to demand payment in advance of his lawful fees when the writ is demanded or issued for the discharge from custody of a person confined under color of proceedings in any criminal case.

In case of imprisonment in a civil suit, costs shall be taxed against complainant in case of defendant's discharge; but against defendant if he be remanded.[7]

[1] 1 C. S. C. R. 166.
[2] See Wehrman & Co. *v.* Reakirt, 1 C. S. C. R. 230, 240.
[3] Code, sec. 5288.
[4] Code, sec. 5718.
[5] Code, sec. 5377.
[6] Code, sec. 5744.
[7] R. S., sec. 5753.

Sec. 861. Subsequent suit on counter-claim or set-off.—If defendant omits to set up a counter-claim or set-off, he cannot in a subsequent suit thereon, recover costs,[1] but this section does not apply to causes of action which are stricken out of, or is withdrawn from the answer or where a new party is necessary to a final decision of a counter-claim or set-off.[2] Nor does it apply to a case of confession of judgment before a justice of the peace.[3]

Sec. 862. Quo warranto.—When a defendant is found guilty of usurping, intruding into, or unlawfully holding or exercising, an office, or privilege, judgment shall be rendered that such defendant be ousted and excluded therefrom, and that relator recover his costs.[4]

Sec. 863. In cases of occupying claimants.—When the jury finds a balance in favor of the occupant, he is entitled to a judgment for costs.[5] The prevailing party is entitled to costs though he be the party ejected.[6]

Sec. 864. In contest of will.—The statutes with reference to contest of wills do not cover the question of costs, so that the general statutes governing the award of costs will apply, and the case will fall of necessity under the section leaving it to the discretion of the court.[7] Where a will is adjudged invalid the executor is not entitled to charge the estate with the expense of making defense, as that duty is not imposed on him.[8]

Sec. 865. In replevin.—If the plaintiff in replevin recover possession of the property, he may have judgment for costs.[9] But if judgment is rendered against the plaintiff on demurrer, or if he fails to prosecute his action to final judgment, the defendant, if he proves himself entitled to the property, may have judgment, with costs of suit.[10] Although several orders for the delivery of property may issue, at the option of the plaintiff, only one of them shall be taxed in the costs, unless the court otherwise orders.[11]

Sec. 866. Costs on appeal.—The code provides that a plaintiff who appeals a cause and does not recover a sum greater

[1] Sec. 5348, amended 94 O. L. ——. See 2 C. S. C. R. 249, 5 C. C. 488; Witte *v.* Lockwood, 39 O. S. 141, 144, and cases.

[2] See R. S., secs. 5071, 5089.

[3] Black *v.* Chesser, 12 O. S. 621.

[4] R. S., sec. 6774.

[5] Beardsley *v.* Chapman. 1 O. S. 118.

[6] Martin's Lease, 1 Oh. 156.

[7] Code, sec. 5351.

[8] Andrews *v.* Admrs., 7 O. S 143.

[9] Code, sec. 5348.

[10] Code, sec. 5824.

[11] Code. sec. 5828.

than in the court appealed from, exclusive of costs and interest accrued after the judgment, must pay the costs on appeal.[1] Where the court from which a cause is appealed does not have jurisdiction thereof, but the parties submit themselves to the jurisdiction of the appellate court, the costs in the lower court cannot be included in the judgment in the appellate court.[2] An appellant from the judgment of a justice is not bound to pay the costs before he can demand a transcript.[3]

Sec. 867. Costs on error.—When a judgment or final order is reversed, the plaintiff in error shall recover his costs, and when reversed in part, and affirmed in part, the court may apportion the costs between the parties in such manner as it deems equitable.[4] The judgment for costs rendered in the supreme court, upon affirmance or reversal, only embraces the costs accruing on error, and none of the costs which accrued in the court below.[5] Where a cause is reversed in part it is proper under this section to divide the costs equally between the parties.[6] So, where the judgment of the lower court is found too large and is reduced, the costs on error may be equally divided.[7] When judgment is reversed because rendered without jurisdiction, costs should be adjudged against the plaintiff in error.[8] Costs adjudged by mistake against the wrong party, may on error be taxed against the right party.[9]

The cost of printing the record is taxed as part of the costs,[10] but not the expense of printing the briefs. Counsel fees may be included when there is not reasonable grounds of error.[11]

When error is prosecuted from a justice to the court of common pleas and is there affirmed, the court may render judgment against the plaintiff in error for costs of suit.[12] It has been held that on error from a justice's court, when the judgment is reversed, that the court must render judgment in favor of the plaintiff in error for costs.[13]

[1] Code, sec. 5237.
[2] Harrington *v.* Heath, 15 Ohio, 483.
[3] Leffingwell *v.* Flint, 1 Oh. 274.
[4] Code, sec. 6727.
[5] Cartwright *v.* Sole, 16 Ohio, 316.
[6] Sidner *v.* Alexander, 31 O. S. 433; Bouton *v.* Hathaway, 10 O. S. 452.
[7] Insurance Co. *v.* Pottker, 33 O. S. 459, 467.
[8] Burke *v.* Jackson, 22 O. S. 268.
[9] Armstrong *v.* McAlpin, 18 O. S. 184.
[10] Code, sec. 6711.
[11] Code, sec. 6711.
[12] Code, sec. 6732.
[13] Belford *v.* Parrish, 22 O. S. 371.

CHAPTER XL.

NEW TRIAL, AND OTHER RELIEF AFTER JUDGMENT.

SEC.
868. New trial, vacation or modification of judgment after term.
869. When grounds could not with reasonable diligence have been discovered before.
870. In proceedings against party constructively summoned.
871. For mistake, neglect, or omission of clerk.
872. Same, continued — Court may hear evidence.
873. For irregularity in obtaining judgment or order.
874. For fraud.
875. Erroneous proceedings against infant or lunatic.
876. For death of one of the parties before judgment.
877. For unavoidable casualty, &c.
878. For errors in judgment against an infant.
879. Judgments upon warrants of attorney.
880. When judgment obtained under false testimony.
881. When judgment on service by publication.
882. *Bona fide* purchaser unaffected.
883. Procedure when by motion.
884. When procedure must be by petition—Valid defense must first be found.
885. Limitations.
886. Supreme court may grant relief after term.

SEC. 868. New trial, vacation or modification of judgment after term.—The common pleas court, or the circuit court, are empowered to vacate or modify their own judgment or order, after the term at which the same is made, by granting a new trial upon the grounds named in the statute.[1] The same provisions are applicable to the supreme court.[2] These grounds will be taken up separately

The proceeding provided by statute with reference to this matter is ancillary to the original action, and in effect a continuance of it, and the parties are bound by any action the court may properly take relating to the proceedings or the merits of the action.[3] The court has no power to modify a decree or judgment after the term at which it is rendered except in accordance with the statutes,[4] which provide how and on what grounds an order can be vacated after term.[5]

Where an application is made for a new trial more than three days after judgment, but at the term when the same was rendered, it is said that section 5354 ought to apply and govern.[6]

[1] Code, sec. 5354.
[2] Sec. 5365.
[3] Mannix *v.* Elder, 1 O. C. C. 59, 62; 1 O. C. D. 36.
[4] Sec. 5354 *et seq.*
[5] Thatcher *v.* Dickinson, 3 O. C. C 144; s. c. 2 O. C. D. 82.
[6] Smead Foundry Co. *v.* Chesbrough, 18 O. C. C. 783.

Sec. 869. When grounds could not with reasonable diligence have been discovered before.—The common pleas, or circuit court may grant a new trial, when the grounds therefor could not, with reasonable diligence, have been discovered before, but are discovered after the term at which the verdict, report, or decision was rendered or made.[1]

Sec. 870. In proceedings against party constructively summoned.—A new trial, after term, may be granted in proceedings against defendants who have been constructively summoned.[2]

Sec. 871. For mistake, neglect or omission of clerk.—A new trial, after term, may be granted on account of a mistake, neglect, or omission of the clerk.[3] Every court, in the exercise of its supervisory and protecting charge over its records and the papers belonging to its files, has the power to direct the clerk to correct not only clerical errors, but such errors as may arise from any fraudulent or improper alteration or mutilation of its files or records.[4]

Such errors, for example, as where the judge notes on his docket that a motion is refused instead of allowed, which leads the clerk to make a like entry on the journal of the court;[5] or the entry of a verdict and judgment which is entered as of a wrong date.[6]

A judgment entered on the journal different from what was intended by the court, but which is shown to be such as ought to have been rendered, will not be vacated as entered by mistake.[7]

Sec. 872. Same, continued—Court may hear evidence.—Whether a mistake has been made is a question of fact to be determined by the court upon competent evidence. The court is not required to act upon its own personal knowledge. The papers in the case, the recollection of the judge who rendered the decision, in connection with that of others who have knowledge of the matter, as well as the minutes of the judge, are competent evidence.[8] Parol evidence is admissible in such a case.[9]

Sec. 873. For irregularity in obtaining judgment or order.—Irregularity in obtaining a judgment or order is ground for grant-

[1] Secs. 5354, 5309.
[2] Secs. 5354, 5045.
[3] Sec. 5354.
[4] Hollister *v.* Judges, 8 O. S. 201.
[5] Elliott *v.* Plattor, 43 O. S. 198. A clerical error in the entry of the judgment. Ohio *v.* Beam, 3 O. S. 508.
[6] Lambert *v.* Mustard, 18 O. S. 419; Warrington *v.* Mfg. Co., 18 O. C. C. 311.
[7] Murphy *v.* Swadner, 34 O. S. 672.
[8] Elliott *v.* Plattor, 43 O. S. 198; Hollister *v.* Judges, 8 O. S. 201.
[9] Murphy *v.* Swadner, 34 O. S. 672.

ing a new trial after term.[1] The power to set aside or vacate a judgment, subsequent to the judgment term, is governed by settled principles, to which the action of the court must conform. The court, in a proceeding of this kind, exercises an equitable jurisdiction, and should not vacate a judgment or order against the right and justice of the case.[2] An irregularity within the meaning of this provision, is some act done, or step taken by the court, either *sua sponte*, or upon request, or by an officer, which is not according to the regular course of procedure, and by which a party is deprived of the benefit of a defense to the action, without fault on his part.[3]

For instance, judgment entered where no process is served upon a defendant, and an attorney enters an appearance without authority, is an irregularity, and will be set aside;[4] and so with a judgment taken on a warrant of attorney without filing the original warrant or a copy thereof.[5] The rendition of judgment for the plaintiff, as upon default, where a demurrer has been duly filed to the petition and remains undisposed of, is an "irregularity in obtaining judgment," for which the court may upon motion and a proper showing, vacate the judgment.[6]

Sec. 874. For fraud.—A judgment may be vacated or modified at a term subsequent to its rendition, for fraud practiced by the successful party in obtaining the same.[7] This remedy is held to be cumulative, and does not interfere with the jurisdiction which courts of equity have to impeach judgments for fraud and enjoin proceedings thereon. It is a fundamental principle that when such courts have once been legitimately vested with jurisdiction they may retain it, notwithstanding courts of law subsequently acquire jurisdiction by statute or otherwise, unless the legislature abolish or restrict the same.[8]

Representations made by counsel to the court, asking the entry of a judgment in the absence of counsel for the party against whom the judgment is asked, to the effect that such counsel had consented to the entry of such judgment, is a fraud.[9] A judgment procured to be entered by default for answer without evidence, for a demand not founded on contract, express or implied, is fraud in the prevailing party.[10] Parties who enter into a conspiracy to and do testify falsely, and thereby obtain

[1] Sec. 5354.
[2] Huntington *v.* Finch, 3 O. S. 445.
[3] Commissioners *v.* Cambridge, 7 O. C. C. 72.
[4] Critchfield *v.* Porter, 3 O. 519.
[5] Bank *v.* Doty, 9 O. S. 506.
[6] Follett *v.* Alexander, 58 O. S. 202.
[7] Sec. 5354.
[8] Darst *v.* Phillips, 41 O. S. 514; Long *v.* Mulford, 17 O. S. 484; Coates *v.* Bank, 23 O. S. 415; Howenstine *v.* Sweet, 13 O. C. C. 239.
[9] Ralston *v.* Wells, 49 O. S. 298.
[10] Pollock *v.* Pollock, 2 O. C. C. 143.

a judgment, is also fraud practiced by the successful party.[1] Where an answer is prevented by plaintiff's attorney having withdrawn the papers from the files, a judgment by default will be set aside.[2]

Sec. 875. Erroneous proceedings against infant or lunatic.—A new trial may be granted after term, for erroneous proceedings against an infant, or person of unsound mind, when the condition of such defendant does not appear in the record, nor the error in the proceedings.[3]

Sec. 876. For death of one of the parties before judgment.—If one of the parties die before the judgment in the action, a new trial may be granted after the term.[4] Where a party dies pending an action, and judgment is rendered against him after his death, his administrator may come in and take advantage of this statute and apply for relief thereunder.[5]

Sec. 877. For unavoidable casualty, &c.—New trial after term may be granted for unavoidable casualty or misfortune, preventing the party from prosecuting or defending.[6] Negligence of the attorney of a party in not attending to a case, is not ground to vacate a judgment upon this ground.[7] It is not enough to show that from unavoidable casualty or misfortune a party was incapable of making a defense, but he must show further that he has a defense.[8] Absence of a party from the State at the time of service of summons by copy left at his residence, is not unavoidable casualty.[9]

Sec. 878. For errors in judgment against an infant.—A new trial after term will be granted for errors in a judgment, shown by an infant within twelve months after arriving at full age.[10]

Sec. 879. Judgments upon warrants of attorney.—New trial after term may be granted for "taking judgments upon warrants of attorney for more than was due the plaintiff, when the defendant was not summoned, or otherwise legally notified of the time and place of taking such judgment."[11] If the plaintiff remits the excess and the judgment is thereby reduced to the amount actually due, there is no ground for vacating the judg-

[1] Baldwin *v.* Sheets, 39 O. S. 624.
[2] Williams *v.* Heisley, 1 Clev. 196.
[3] Sec. 5354.
[4] Sec. 5354.
[5] Welton *v.* Williams, 28 O. S. 472.
[6] Sec. 5354.
[7] Gordon *v.* Cowle, 1 Clev. 18; Williams *v.* Heisley, 1 Clev. 196. See Selberg *v.* Davidson, 1 Clev. 194.
[8] Howard *v.* Abbey, 1 W. L. M. 278.
[9] *Id.*
[10] Sec. 5354.
[11] Sec. 5354.

ment.[1] If such a judgment is opened up, and upon issues joined in a second trial resulting in favor of the plaintiff for the same amount as on the former trial, judgment may be rendered for the costs of the latter trial.[2]

Sec. 880. When judgment obtained upon false testimony.—A new trial may be granted after term and judgment vacated; "When such a judgment or order was obtained, in whole or in a material part, by false testimony on the part of the successful party, or any witness on his behalf which ordinary prudence could not have anticipated or guarded against, and the guilty party has been convicted."[3]

Sec. 881. When judgment on service by publication.—A party against whom a judgment or order has been rendered without other service than by publication in a newspaper, may at any time within five years after the date of the judgment or order, have the same opened, and be let in to defend. The party seeking to have such a judgment opened is required to give the adverse party notice of his intention to make such application, and must file a full answer to the petition, pay all costs, if the court so requires, and must also make it appear that during the pendency of the action he had no notice thereof in time to appear and make his defense. Each party may substantiate their claims by affidavits.[4] The notice required to be given by this section to the adverse party must be given to such party to the case as may be interested in maintaining such judgment.[5] A judgment for divorce rendered on service by publication may be opened up under this provision.[6]

Sec. 882. Bona fide purchaser unaffected.—The title to any property which is the subject of the judgment or order sought to be opened, and which, by or in consequence of the judgment or order, has passed to a purchaser in good faith, will not be affected by any proceedings to open up such judgment.[7] The title of the purchaser, at judicial sale, cannot, as a general rule, be impeached in equity for errors or irregularities in the proceedings.[8]

Sec. 883. Procedure when by motion.—The manner of proceeding to obtain relief under these provisions depends upon what grounds the same is asked. If it is desired to correct mis-

[1] Doty *v.* Bank, 16 O. S. 133.
[2] Bank *v.* Slemmons, 34 O. S. 142.
[3] Sec. 5354.
[4] R. S., sec. 5355.
[5] Fitzgerald *v.* Cross, 30 O. S. 444.
[6] Van Derveer *v. Id.*, 30 W. L. B. 96.
[7] R. S., sec. 5356.
[8] Stites *v.* Wiedner, 35 O. S. 555.

takes or omissions of the clerk, or an irregularity in obtaining a judgment or order, the course marked out by the code is to file a motion for that purpose. The motion should be placed on the motion docket and heard as other motions, after reasonable notice thereof is given to the adverse party or his attorney.[1] A motion to vacate a judgment because of its rendition before the action regularly stood for trial can be made only in the first three days of the succeeding term.[2]

It is error to vacate such a judgment or order without proper notice, and if the record be silent in this particular, and no waiver is shown by an appearance, no presumption of notice can be admitted.[3] Of course where the adverse party appears and defends, the notice required by the statute is waived.[4] A notice in writing containing the names of the parties to the action, name of the court or judge before whom the motion is to be made, place and day where and when it will be heard, and the nature and terms of the order applied for, should be given. If such notice is omitted, or if the notice served is insufficient, the proceeding is irregular, and confers no jurisdiction on the court to hear the matter and correct the judgment.[5] Upon the hearing of such motion the court must not enter a judgment of vacation before it adjudges that there is a valid defense.[6]

Sec. 884. When procedure must be by petition—Valid defense must first be found.—When relief is asked upon any of the other enumerated grounds mentioned in the statute, that is, other than for mistakes or omissions, or irregularity in obtaining the judgment, it must be in the form of a petition, duly verified, setting forth the judgment or order, and the grounds upon which it is claimed the judgment or order should be modified or vacated. If the party filing the petition was a defendant in the action against which he is seeking relief, he must state his defense thereto, etc. A summons must be issued upon the filing of the petition and regularly served as in the commencement of an action.[7] A person, making application for relief under this provision submits himself to the jurisdiction of the court and is bound by any judgment that may be rendered.[8] It is special proceeding, however, from which error may be prosecuted.[9]

[1] Code, sec. 5357.
[2] 5357.
[3] Hettrick *v.* Wilson, 12 O. S. 136.
[4] Braden *v.* Hoffman, 46 O. S. 639, 641; Elliott *v.* Plattor, 43 O. S. 198.
[5] Nye *v.* Stillwell, 12 O. C. C. 40.
[6] Follett *v.* Alexander, 58 O. S. 202.
[7] Sec. 5358.
[8] Watson *v.* Paine, 25 O. S. 340.
[9] Taylor *v.* Fitch, 12 O. S. 169.

The course to be pursued by the court in the hearing of the matter is to first try and decide upon the grounds to vacate a judgment or order before trying or deciding upon the validity of defense or cause of action.[1] A judgment cannot be vacated until it is adjudged that there is a valid defense.[2] In some cases the question to be tried and determined may be decided by an inspection of the record, and in others by the testimony of witnesses. In all cases the question as to the right to relief must be tried and decided by the court ; and when it is found that a ground exists for the vacation or modification of a jndgment, the case is not then ready for a final judgment of vacation or modification. If the proceeding to vacate be by motion, the party seeking relief should then be required to file his answer to the original petition, and the case would then proceed. If by petition, in which matters of defense are set forth in issuable form, an issue may be taken by demurrer or reply. If the issue is thus made up, the case must be tried as in other cases.[3] This, however, is not the ordinary course to be pursued. The merits of the grounds for vacation or modification should first be determined, and then the issues as to the validity of the alleged defense should be made up by proper pleadings, and tried as in other cases.[4]

The object of the statute in postponing the judgment to vacate until it shall be adjudged that there is a valid defense to the action, is to preserve the liens and rights of parties under the original judgment, in case a similar judgment should be rendered upon the trial of the cause. The judgment to vacate should be suspended until after the cause is tried, and if, on trial the defense is established, then judgment of vacation is entered. If the defense fails, the judgment is to be affirmed, or such other judgment entered as the result of the trial indicates.[5] The court should not, after having found grounds for the vacation of a judgment or order, proceed to adjudge the validity of a defense thereto when a right to trial by jury existed therein, as this provision was not intended to deprive parties of their right to trial by jury.[6] A person seeking relief under this provision may obtain an injunction suspending the proceedings against which relief is sought.[7]

[1] O. Code, sec. 5359.

[2] O. Code, sec. 5360. It is error to vacate the judgment before it is found that there is a valid defense. Braden *v.* Hoffman, 46 O. S. 639; Commissioners *v.* Cambridge, 7 O. C. C. 72; Smead Foundry Co. *v.* Chesbrough, 18 O. C. C. 783.

[3] Watson *v.* Paine, 25 O. S. 345.

[4] Watson *v.* Paine, 25 O. S. 340.

[5] Frazier *v.* Williams, 24 O. S. 625; Braden *v.* Hoffman, 46 O. S. 639, 641.

[6] Watson *v.* Paine, 25 O. S. 340; Frazier *v.* Williams, 24 O. S. 625.

[7] O. Code, sec. 5361.

Where judgment has been obtained by false representations made by counsel for the prevailing party, it is a fraud, and relief must be sought by a petition.[1]

Sec. 885. Limitations.—Proceedings to vacate or modify a judgment or order on the ground of fraud practiced by the successful party, or for erroneous proceedings against an infant, or for unavoidable casualty or misfortune, must be commenced within two years after the judgment was rendered. For relief on account of mistake, neglect or omission of the clerk, or irregularity in obtaining the judgment, or for the death of one of the parties, within three years ; for judgments upon warrants of attorney within two years, and for obtaining judgment by false testimony, after the guilty party is convicted, if that is within two years from the rendition of the judgment. Persons within the age of majority, of unsound mind, or imprisoned, have the times limited by the statute after such disability is removed.[2]

Sec. 886. Supreme court may grant relief after term.—The provisions of the code authorizing the vacation or modification of judgments or orders, after the term at which the same were entered or made, are made applicable to the supreme court so far as the same can be.[3] An infant, on arrival at full age, seeking to avail himself of these provisions as against a judgment rendered by the supreme court, which has been reversed by that court and remanded to the court in which it had been rendered, with direction to render a judgment, which is done, must commence proceedings in the court below, where the judgment was in fact rendered.[4]

[1] Ralston *v.* Wells, 49 O. S. 298.
[2] Code, sec. 5363.
[3] Code, sec. 5365.
[4] Carey *v.* Kemper, 45 O. S. 93.

CHAPTER XLI.

NUNC PRO TUNC ENTRIES.

SEC.
887. Power to make—Nature and extent.
888. Power over record not affected by lapse of time.
889. Statute of limitation runs against such a judgment when.
890. Force and effect of such entries.
891. Judgment *nunc pro tunc* entered after death of party.
892. Such entry must not affect rights of third party.
893. When entry cannot be made.
894. Evidence necessary to support entry *nunc pro tunc*.
895. Practice in applying for the order.
896. *Nunc pro tunc* order not reviewable.

SEC. 887. Power to make—Nature and extent.—The power to enter judgments and orders *nunc pro tunc* has been exercised by courts of record—courts of law and equity—from the earliest times. "The inherent power of courts of record to correct their records in furtherance of justice is of ancient exercise."[1] Power to vacate or modify judgments after the term at which made, is conferred upon the common pleas by statute,[2] for mistake, neglect or omission. A clerical error in the entry of a judgment may be corrected on motion, at a subsequent term.[3] But entering up a judgment *nunc pro tunc* is not a modification, and the power which the court has in this regard is inherent.[4] Doubtless a court retains jurisdiction over its records, and may correct them so as to make them set forth whatever act the court performed in a cause at a prior term; but in the absence of some statutory provision, its jurisdiction of the cause terminates with the term at which final judgment is entered. Were the rule otherwise, the stability of judgments would be destroyed; they would be found, not alone in the records of the court, but in those records and the memory of the judge combined. After the close of the term, therefore, the court cannot enter an order *nunc pro tunc* unless one was actually made and omitted to be entered.[5]

[1] *In re* Janett, 42 O. S 200; Jacks *v.* Adamson, 56 O. S. 397, 402; Chissom *v.* Barbor, 100 Ind. 1; Hodges *v.* Templer, 6 Mod. 191.

[2] Sec. 5354.

[3] Ohio *v.* Beam, 3 O. S. 508.

[4] Loring *v.* Groomer, 110 Mo. 632; Reid *v.* Morton, 119 Ill. 118.

[5] Cleveland Leader Printing Co. *v.* Green, 52 O. S. 487, 493; Tarbet *v.* Coffin, 6 Ohio, 33; Long *v.* Long, 85 N. C. 417; Huber Mfg. Co. *v.* Sweny, 57 O. S. 169.

It is admitted that the power of courts of record to correct their records exists, and that it is restricted to placing upon record evidence of judicial action which has been actually taken—that it can be exercised only to supply omissions in the exercise of functions that are clerical merely.[1] All courts have the inherent power after the close of the term to correct its entries so as to make them speak the truth. The source of this power is justice, and therefore, the courts must have some discretion in altering their records so they may import absolute verity.[2] Every court, in the exercise of its supervisory and protecting charge over its records and the papers belonging to its files, may make corrections therein.[3] But the entry *nunc pro tunc* is to supply an omission or defect, to supply evidence and not to modify matters of fact.[4] The power to enter *nunc pro tunc* orders and judgments is discretionary. It may be exercised, in a proper case, to prevent injustice. Whenever there is foundation presented by the facts of the case, for the exercise of such power, there should be no hesitation in making the entry.[5] Such an entry should never do an injustice.[6] The power to modify or set aside a judgment, at a subsequent term, does not imply a power to enter a judgment where none existed.[7] A mere erroneous judgment cannot be corrected by an entry *nunc pro tunc.*[8]

Sec. 888. Power over record not affected by lapse of time.—It is said that the power of the court over its record is a continuing one, not affected by lapse of time,[9] and that there is no doubt that in a proper case and upon satisfactory proof a *nunc pro tunc* entry may be had, many years after a record has been made up, correcting the entry so that it shall conform to the actual order or judgment of the court; but the order or judgment must have been in fact made, and in no case should that be added to the record which is not properly a part thereof.[10]

Sec. 889. Statute of limitations runs against such a judgment when.—It has been considered that the statute of limitations does not run against a *nunc pro tunc* judgment until it is properly entered. For the purpose of a statute of limitations the date of the entry of a judgment *nunc pro tunc* is the date of the order of such entry, and not the day as of which the judgment is ordered to take effect.[11]

[1] Jacks *v.* Adamson, 56 O. S. 397, 402.
[2] Tanner *v.* Hayes, 47 Ala. 722.
[3] Hollister *v.* Judges, 8 O. S. 201.
[4] Garrison *v.* People, 6 Neb. 274; Cassidy *v.* Woodward, 77 Ia. 354.
[5] Dial *v.* Holter, 6 O. S. 228, 246.
[6] Moore *v.* Meek, 8 Kan. 153.
[7] Tarbett *v.* Coffin, 6 O. 33.
[8] Atkinson *v.* R. R. Co., 81 Mo. 50.
[9] Freeman on Judgments, sec. 63.
[10] City *v.* Preston, 50 O. S. 361, 369; The Cleveland, &c., Co. *v.* Green, 52 O. S. 487.
[11] Borer *v.* Chapman, 119 U. S. 587.

Sec. 890. Force and effect of such entries.—Judgments entered *nunc pro tunc* have the same force and effect as all other judgments, unless such entry fails to protect the rights of third parties, who have no notice of such judgments.[1]

Sec. 891. Judgment nunc pro tunc entered after death of party.—Where a party to an action dies after trial and submission to the court, but before a decision is announced, the court has jurisdiction, in furtherance of justice, to enter judgment *nunc pro tunc* as of the day of submission.[2] For example, where a defendant files a motion for a new trial and afterwards dies, and the motion is continued to another term for hearing, the court may, if such motion be overruled, enter judgment *nunc pro tunc* upon the verdict, as of the term in which it was found.[3] It has been considered that where a judgment has been delayed by the act of the court, and death of the party occurs while the court is considering it, the court should allow judgment to be entered up after the death, in order that a party may not be prejudiced by a delay arising from the act of the court.[4] A judgment cannot be entered *nunc pro tunc* under such circumstances, unless the action at the time of the death of such party is ready for the rendition of the final judgment.[5] If, however, the delay is due to the act of the parties and not by the act of the court such a judgment cannot be entered [6]

Sec. 892. Such entry must not affect rights of third party.—It is entirely settled law that an entry of judgment *nunc pro tunc* will not be ordered where it will prejudice intervening rights of innocent parties. It will relate back to the time when it was actually rendered so far as it affects the rights of the original parties thereto, but not so as to affect third parties.[7] It is therefore impossible to bind the real estate of the judgment debtor by the lien of such judgment if it has in the meantime passed into the hands of a third innocent person. A purchaser of real estate takes it charged with the lien of such judgments as are actually existing at the time he purchases.[8] And it is perfectly well understood that a party is justified in dealing with real estate of one against whom a suit is pending after a term of court has closed and no judgment is rendered during such term, and before the commencement of another term. Such

[1] Reid *v.* Morton, 119 Ill. 118; 14 Tex. 455; 67 Ala. 333; 4 B. Mon. 18; 9 Gray, 209.

[2] *In re* Janett, 42 O. S. 199; Dial *v.* Holter, 6 O. S. 228.

[3] Dial *v.* Holter, 6 O. S. 228.

[4] Chitty's Archbold's Practice, Q. B., cited in 42 O. S. 201.

[5] Freeman on Judgments, sec. 59.

[6] Freeman on Judgments. sec. 60

[7] Coe *v.* Erb, 59 O. S. 259, 265; Black on Judgments, sec. 137.

[8] *Id.*

party looks to the journals and records of the courts for such judgments.

Sec. 893. When entry cannot be made.—As the object of a *nunc pro tunc* entry is to supply an omission of the evidence of what was actually done,[1] it follows that a *nunc pro tunc* entry cannot be made to supply the defects in an entry which fails to state some material fact, as correcting a judgment by striking out or inserting something;[2] or allowing a new trial where the party desiring it failed to enter his notice or demand for it at the term of court at which judgment was rendered;[3] or to cure an omission to enter upon the journal a notice of appeal, a notice entered upon the court docket, but not incorporated in the entry, not being sufficient.[4] But this rule certainly is not good where the party actually gave notice of appeal and the same was entered by the court upon its docket, but it was inadvertently omitted from the entry. The act was actually done. Thus it has been held that where the trial docket shows the reasons for the discharge of a jury, an omission of such fact in the entry may be supplied by a *nunc pro tunc* entry.[5]

The court has no jurisdiction after the cause has ended to ascertain and declare what the propositions of law given to the jury were, and a *nunc pro tunc* order to that effect is absolutely void. The only lawful method is by bill of exceptions taken and perfected within the time and in the manner provided by statute.[6] The court is without authority, after the term, to order an entry that a bill of exceptions has been filed as of a previous term, long after the time allowed by statute for the filing of the same.[7]

Sec. 894. Evidence necessary to support entry nunc pro tunc.—The question as to what kind of evidence it will take to warrant the court in making an entry *nunc pro tunc* has been the occasion of considerable discussion by the courts. It is quite essential that there be evidence of such character as will clearly warrant the court in making such an order, and it is self-evident that it would be a dangerous rule to risk too much on the memory of the court. Rights acquired under judgments rest upon firm foundations because of the confidence reposed in their inviolability, and this doubtless is the consideration which controls the rights of third parties.[8] The power to affect their operation or

[1] Toledo *v.* Preston, 50 O. S. 369.
[2] Brown *v.* R. R. Co., 72 Mo. 567.
[3] Markward *v.* Doriat, 21 O. S. 637.
[4] Moore *v.* Brown, 10 Ohio, 197. See Mathers *v.* Bull, 18 O. C. C. 196.
[5] Benedict *v.* State, 44 O. S. 679.
[6] City *v.* Preston, 50 Ohio St. 361.
[7] Britton *v.* Leslie, 14 O. C. C. 532.
[8] Sec. 892, *ante*.

change their import by *nunc pro tunc* entries, should be exercised with caution.[1] In some States the power is denied the courts unless their action is supported by some written memorandum.[2] This was the position taken by the court in Ohio in quite an early case,[3] and many of the cases decided where entries *nunc pro tunc* have been allowed, have been supported to some extent by written memorandums.[4] There are authorities to the effect that the court may allow such entries to be made upon competent legal evidence.[5] The latest expression of the supreme court definitely concludes that parol testimony of witnesses having personal knowledge of the fact that an order was made is admissible ; it is considered that this power should be exercised upon evidence which shows clearly and convincingly that the order was in fact made by the court.[6]

Sec. 895. Practice in applying for the order.—Any one having rights depending upon or affected by the judgment may apply for an entry *nunc pro tunc.*[7] The application should be by motion setting forth the facts, and notice should be given the opposite party as in other actions.[8]

Sec. 896. Nunc pro tunc order not reviewable.—The action of the court in allowing a *nunc pro tunc* order, cannot be reviewed in a proceeding instituted simply to reverse such order. It is not a final order. The error, if any, is of no consequence unless a proceeding is commenced to reverse the final judgment in the action.[9]

[1] Hyde *v.* Curling, 10 Mo. 363, cited in 42 O. S. 492.

[2] Hyde *v.* Curling, 10 Mo. 359; Belkin *v.* Rhodes, 76 Mo. 643; 61 Ala. 399; 27 Cal. 491; 72 Ill. 419; 85 Tenn. 377.

[3] Ludlow *v.* Johnson, 3 Ohio, 553, 578.

[4] Bothe *v.* Railroad Co., 37 O. S. 147; Moore *v.* Brown, 10 Ohio, 197; Markward *v.* Doriat, 21 O. S. 637; Mitchell *v.* Thompson, 40 O. S. 110; Benedict *v.* State, 44 O. S. 679.

[5] Frink *v.* Frink, 43 N. H. 508; 18 Me. 183; 25 Conn. 337. Oral evidence may be allowed to aid the court. Freeman on Judgments, sec. 63.

[6] Jacks *v.* Adamson, 56 O. S. 397, 402; Brownlee *v.* Comsrs, 101 Ind. 401.

[7] Reid *v.* Morton, 119 Ill. 118; Crim *v.* Kessing, 89 Cal. 478.

[8] See Kinkead's Entries, p. 723, for forms.

[9] Cincinnati *v.* Steadman, 53 O. S. 312. See Mathers *v.* Bull, 18 O. C. C. 196.

CHAPTER XLII.

EXECUTION AND SALE.

SEC.
897. Judgment liens creatures of statute—Co-extensive with jurisdiction of court.
898. Lien attaches to what property—And when.
899. Lien attaches to what property, continued.
900. Does not attach to what.
901. The first day or commencement of the term of court.
902. Lien of judgment of supreme court.
903. Lien of judgment of justice or mayor.
904. Same, continued—How lien is obtained upon judgment of justice in county other than where rendered.
905. When judgment becomes dormant and ceases to be a lien.
906. The execution—Issuance and levy to preserve and protect lien of judgment.
907. Execution—When issued.
908. The command and indorsement.
909. Execution against partnership.
910. Levy how made.
911. Terms of sale may be directed in the judgment.
912. No preference to executions when liens equal.
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915. Levy and sale of goods and chattels.
916. Appraisement of lands.
917. At what price land to be sold.
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919. Publication in German newspaper.
920. Return of writ.
921. Purchaser in contempt for failing to pay purchase money.
922. Where sales take place.
923. Confirmation of sale.
924. New appraisement when necessary.

SEC. 897. Judgment liens creatures of statute—Co-extensive with jurisdiction of court.—Judgment liens are of legislative creation, and, where not otherwise limited, they extend to all the lands of the judgment debtor within the territorial jurisdiction of the court rendering the judgment. The power which creates the lien has equal authority to define its limits.[1] Being creatures of statute their extent, nature and duration are such as the statute prescribes.[2] A judgment of a United States district or circuit court has the same lien on the lands of the debtor within the district, that a State court has within the limits of its territorial jurisdiction.[3] A judgment of a superior court of a city binds all the lands within the county where the city is

[1] Linsley *v.* Logan, 33 O. S. 376, 379; Kilbreth *v.* Diss, 24 O. S. 379, 383; Corwin *v.* Benham, 2 O. S. 37.

[2] Tucker *v.* Shade, 25 O. S. 355. "The existence, validity, and extent of a judgment lien are matters purely legal, dependent upon statutory provisions." Douglass *v.* Huston, 6 Ohio, 156, 162; Gorrell *v.* Kelsey, 40 O. S. 117, 120.

[3] Lawrence *v.* Belger, 31 O. S. 175.

located.[1] The interest which a judgment may bind must be one which can be levied on and sold to satisfy it.[2]

Sec. 898. Lien attaches to what property—And when.—The lien of a judgment attaches to all lands and tenements, including vested interests therein, permanent leaseholds renewable forever, within the county where the judgment is rendered; and such lands are bound from the first day of the term at which such judgment is rendered. Judgments rendered by confession, and those rendered at the same term at which the action is commenced, however, only bind the lands from the day they are rendered. All other lands, as well as goods and chattels of the debtor, are bound from the day they are seized in execution.[3] In order to create a lien upon the lands of the judgment debtor, as of the first day of the term at which the judgment is rendered, under favor of this section, the judgment must not only be pronounced, during the term, but an entry of such judgment must be made on the journal during the term.[4]

Sec. 899. Lien attaches to what property, continued.—The following property interests are subject to the lien of a judgment. Real estate devised and expressly exempted from the payment of the debts of the devisee,[5] an equity of redemption,[6] lands conveyed for the purpose of defrauding creditors;[7] an estate of one in possession, claiming title derived from warranty from an entry and survey not patented;[8] a vested remainder held by the debtor under legal title;[9] a homestead set off to the judgment debtor and afterwards sold by him before the expiration of the lien;[10] an estate for years created by a lease granting a privilege of purchase in fee is a chattel interest, and a judgment lien does not attach.[11] A contract for the sale of real estate does not of itself free the land from the lien of judgments against the vendor; but the payment of the purchase money will entitle the purchaser to protection in equity.[12]

Sec. 900. Does not attach to what.—The lien of a judgment does not attach to after-acquired land aliened by the debtor before levied upon,[13] nor to a mere equity in real estate,[14] nor

[1] Kilbreth *v.* Diss, 24 O. S. 379.
[2] Roads *v.* Symmes, 1 Ohio, 281, 314.
[3] Code, sec. 5375.
[4] Coe *v.* Erb, 59 O. S. 259.
[5] Hobbs *v.* Smith, 15 O. S. 419.
[6] Bank of Canton *v.* Bank, 10 O. 71.
[7] Freeman on Judgments, sec. 350; Douglass *v.* Dunlap, 10 Ohio, 162.
[8] Lessee of Jackson *v.* Williams, 10 Ohio, 70.
[9] Lawrence *v.* Belger, 31 O. S. 175; Freeman on Judgments, sec. 354.
[10] McComb *v.* Thompson, 42 O. S. 139.
[11] Hazard Powder Co. *v.* Loomis, 2 Disney, 544.
[12] Lefforson *v.* Dallas, 20 O. S. 68.
[13] Stiles *v.* Murphy, 4 O. 92.
[14] Baird *v.* Kirtland, 8 O. 21.

does a decree for alimony to be paid in installments operate as a lien upon the real estate of the defendant unless made a charge thereon by the decree itself,[1] nor does the lien attach to real estate purchased at judicial sale before the execution and delivery of a deed therefor,[2] nor to trust estates.[3]

Sec. 901. The first day or commencement of the term of court.—This matter has been discussed in a special chapter.[4] The judges fix the commencement and duration of terms of court. Liens at judgments date from the hour fixed by the court for the commencement of the term.[5] This is determined by the record, and if it be silent the presumption is that court commenced at the time fixed.[6]

Sec. 902. Lien of judgment of supreme court.—A judgment of the supreme court, for money, binds the lands of the debtor, within the county were the suit originated, from the first day of the term at which the judgment is entered, and all other lands, and the goods and chattels of the debtor, from the time they are seized in execution. The lien of the judgment of the common pleas court in an action which is appealed to the circuit court, and thence removed to the supreme court, is not divested or vacated, but continues till the final determination of the action in the supreme court.[7]

In all cases in which judgment is rendered in the supreme court and a special mandate is directed to the common pleas court to carry the same into execution, the lien of the judgment continues from one year after the first day of the term of such court to which such mandate is directed, it being necessary, to preserve the lien, to issue and levy execution thereon within the year.[8]

Sec. 903. Lien of judgment of justice or mayor.—The code provides that the party in whose favor a judgment is rendered by a justice of the peace or mayor of a municipality may file a transcript with the county clerk and make the same a lien upon the lands of the judgment debtor in the county.[9] Such judgment, if the transcript be filed in term time, becomes a lien from the day the transcript is filed. If filed in vacation, the judgment becomes a lien as against the debtor from the day it is

[1] Olin *v.* Hungerford, 10 Ohio, 268.
[2] Gorrell *v.* Kelsey, 40 O. S. 117.
[3] Birchard *v.* Edwards, 11 O. S. 84.
[4] *Ante*, sec. 176. Ch. Terms of Court.
[5] Davis *v.* Messenger, 17 O. S. 231.
[6] Hemminway *v.* Davis, 24 O. S. 150.
[7] Code, sec. 5376; Moore *v.* Rittenhouse, 15 O. S. 310.
[8] Code, sec. 5415.
[9] Code, sec. 5377; McComb *v.* Thompson, 42 O. S. 139.

filed; but as against other transcripts filed in vacation, and judgments rendered at the next term of the court, becomes a lien only from the first day of the term.[1] Execution may be issued on such judgments at any time after the transcript is filed, as if the judgment had been rendered in court, but the lien remains as above.[2]

Sec. 904. Same, continued—How lien is obtained upon judgment of justice in county other than where rendered.—If it is desired to make a judgment of a justice a lien upon land of a debtor situate in a county other than where the same is rendered, the same proceedings are had as in ordinary cases, judgment being taken in the county where the debtor may be served, and the transcript filed with the clerk in that county, and execution may then be issued to any county in the State, where land of the debtor is situated.

Sec. 905. When judgment becomes dormant and ceases to be a lien.—If execution on a judgment rendered in any court of record in this State, or a transcript of which has been filed as provided by law for the perfection of a lien of the judgment of a justice, be not sued out within five years from the date of the judgment, or if five years intervene between the date of the last execution issued on such judgment, and the time of suing out another execution thereon, such judgment shall become dormant and cease to operate as a lien on the estate of the judgment debtor.[3]

When a judgment, including judgments rendered by a justice of the peace or mayor, a transcript of which has been filed in the court of common pleas for execution, becomes dormant, it may be revived in the same manner as is prescribed for reviving actions before judgment,[4] or by action; when either party to such dormant judgment or his agent or attorney, makes affidavit showing that the adverse party is a non-resident of the State, and that such judgment remains unsatisfied in whole or in part, and the amount owing thereon, service may be made by publication, as in other cases; if sufficient cause be not shown to the contrary, the judgment shall stand revived for the amount which the court finds to be due and unsatisfied thereon; and the lien of the judgment for the amount due shall be revived, and shall operate from the time of the entry of the conditional order, or the filing of the petition.[5]

[1] Code, sec. 5378.
[2] Code, sec. 5379.
[3] Code, sec. 5380.
[4] Code, secs. 5148, 5150, 5152.
[5] Code, sec. 5367.

Judgments revived after becoming dormant are enforced in the same manner as though they had not become dormant. When revived it is with all incidents which an original judgment has, as between the same parties.[1] Title of a purchaser from the judgment debtor, is, on the judgment becoming dormant, discharged from the lien, and the subsequent revivor does not affect the same.[2]

Five years must intervene between the date of the execution and the commencement of the action.[3] A judgment which is a first lien loses its priority over a mortgage by becoming dormant.[4]

This provision of the statute has sole reference to judgments for money, and does not apply to decrees or judgments for the sale of specific property;[5] nor does it apply to a decree for alimony which is made a lien on land.[6] It applies to executions issued from other counties as well as those upon judgments within the county.[7]

Sec. 906. The execution—Issuance and levy to preserve and protect lien of judgment.—An execution has been defined as the obtaining of actual possession of anything acquired by judgment at law, and the right to execution follows every final judgment.[8] While a judgment becomes a lien upon all the lands of the debtor from the first day of the term at which it is rendered, there are other steps which must be taken to keep it alive and to preserve its priority as against other liens.

A judgment becomes dormant and ceases to be a lien unless an execution is issued out within five years from the date of the judgment, and another execution is issued every five years thereafter.[9] It has been considered that in order to keep a judgment from becoming dormant under this provision of law, that an execution need only be issued and placed in the sheriff's hands without making an actual levy.[10] In issuing an execution it has been held that it must be actually delivered to the sheriff, as the mere issuance and return without delivery to the sheriff is not sufficient to keep the judgment from becoming dormant.[11]

As between the rights of other judgment creditors, in order to preserve priority of lien, it has been held that the execution

[1] Norton *v.* Beaver, 5 O. 178.

[2] *Id.*; Hutchison *v.* *Id.*, 15 O. 301; Tucker *v.* Shade, 25 O. S. 355, 358.

[3] Cook *v.* Dinsmore, 5 O. C. C. 385, 393.

[4] Miner *v.* Wallace, 10 O. 404.

[5] Moore *v.* Ogden, 35 O. S. 430, 432; Beaumont *v.* Herrick, 24 O. S. 445; Rankin *v.* Hannan, 37 O. S. 116, 117.

[6] Webster *v.* Dennis, 4 O. C. C. 313.

[7] Bank *v.* Coal Co., 11 O. C. C. 412, 422.

[8] Darby *v.* Carson, 9 Ohio, 149, 150.

[9] Sec. 5380.

[10] Bank *v.* Coal Co., 11 O. C. C. 412; 5 O. C. D. 421.

[11] Code, sec. 5380; Kelley *v.* Vincent, 8 O. S. 416.

must not only be issued but actually levied,[1] as the statute provides that "no judgment on which execution is not issued and levied before the expiration of one year next after its rendition, shall operate as a lien on the estate of a debtor to the prejudice of any other *bona fide* judgment creditor."[2]

A return of the execution by order of the creditor without a sale will not discharge a levy which has been properly made, nor terminate the lien.[3]

Sec. 907. Execution when issued.—The statutes are silent as to when an execution may issue upon a judgment. The statutes in some States regulate this matter. In Ohio the execution may issue at any time after the rendition of the judgment and before an appeal has been perfected by the giving of a bond, or a bond has been given for the stay of execution in error proceedings. The procedure with reference to these two matters is given in the author's work on Pleading.[4] Recording a judgment is not regarded as a condition precedent to the issue of execution.[5] Execution issued after the death of a defendant upon a judgment rendered in his lifetime and levied upon lands of which he died seized, is void.[6]

Sec. 908. The command and indorsement.—The writ commands the officer that of the goods and chattels of the debtor he cause to be made the money specified in the writ, and for want of goods and chattels, that he cause the lands and tenements of the debtor to be sold for cash. The exact amount of the debt, damages and costs for which the judgment is entered must be indorsed on the writ.[7]

Sec. 909. Execution against partnership.—A judgment in an action brought against a partnership formed for the purpose of carrying on trade or business in the State,[8] by its ordinary firm name binds only the firm property, and an execution on a judgment rendered against a partnership firm, by its firm name, operates only on partnership property.[9] If it be desired to reach the property of the individual partners, suit should be brought against them in that manner. A partnership, and the members thereof, may be sued individually, both in one action, and judgment rendered against the firm, and the members

[1] Bank *v.* Coal Co., 11 O. C. C. 412; 5 O. C. D. 421.
[2] Code, sec. 5415.
[3] Coal Company *v.* Bank, 55 O. S. 233, 254.
[4] Secs. 1232, 1289.
[5] Freeman, sec. 24.
[6] Massie *v.* Long, 2 Ohio, 287; Cartney *v.* Reed, 5 Oh. 221.
[7] Code, sec. 5381; Monaghan *v.* Monahan, 25 O. S. 325.
[8] Code. sec. 5011.
[9] Code, sec. 5381.

individually[1] and execution issued accordingly. Partnership goods may be levied upon on execution against one of the partners for his separate debt, but the interest of such partners should first be ascertained.[2]

Sec. 910. Levy, how made.—It is said that something more than mere issuance of an execution is required to secure a lien and maintain its priority; there must be an actual levy or seizing of the property—an actual appropriation of it to that particular purpose, by some process of law, to accomplish that result.[3]

In making a levy upon personal property the same should be taken into possession actually or constructively. Generally it is impracticable to take goods into actual possession, so that the sheriff may place the same in charge of a custodian.

An entry upon the land by an officer holding a writ of execution is not necessary to constitute a valid levy on land; it is sufficient if the levy be indorsed on the writ, with a proper description of the land.[4]

Statutory provisions prescribing the order to be observed by an officer in subjecting the debtor's property to sale on a writ of execution, are directory in their nature, and for the benefit of the debtor, who may waive strict compliance therewith.[5]

Sec. 911. Terms of sale may be directed in the judgment.—The court rendering the judgment may order that the real estate be sold under writ of execution, one-third cash on the day of sale, one-third in one year, one-third in two years thereafter, with interest on deferred payments to be secured by mortgage on the premises sold.[6]

[1] Kinkead's Pleading, sec. 969.

[2] Place *v.* Sweetzer, 16 O. 142.

[3] Bish *v.* Burns, 7 O. C. C. 285, 289; 4 O. C. D. 598.

[4] Coal Company *v.* Bank, 55 O. S. 233, 251. "No entry by an officer on real estate is necessary to constitute a levy. The officer may remain in his office and not even go within view of the land; he need not seize upon any twig, turf, or other part thereof as symbolical of the whole. His indorsement upon the execution of a levy will constitute one as to all intents and purposes." Morgan *v.* Kinney, 38 O. S. 610; Coal Co. *v.* Bank, 55 O. S. 233, 251. The lien of a judgment rendered in the county where land is situated is perfected when rendered; an execution may or may not be issued and levied; the lien is not defeated by any prior levy under a judgment subsequently rendered. But as to foreign executions it is different; they have no force or effect outside the jurisdiction of the court rendering it, except by levy and sale. And a mere levy under such an execution and ordering the same returned without further proceeding does not secure a lien. Sturgeon *v.* Mason, 8 O. C. C. 118; s. c. 4 O. C. D. 358; Sturgeon *v.* Hull, 8 O. C. C. 269; 4 O. C. D. 457. When an execution is placed in the hands of a sheriff with instructions not to sell until further orders, it has been held to be in his hands not for any effective purpose. Alabama Gold Life Insurance Co. *v.* McCreary, 65 Ala. 127; *Contra*, Coal Co. *v.* Bank, 55 O. S. 233.

[5] Coal Co. *v.* Bank, *supra*.

[6] Code, sec 5381.

Sec. 912. No preference to executions when liens equal.—No preference can be given when two or more writs of execution against the same debtor are sued out during the term in which judgment is rendered, nor between two or more writs against the same debtor delivered to the officer on the same day. If sufficient money is not realized to satisfy all the executions then the amount is distributed in proportion to the amount of the respective claims. In all other cases the writ first delivered to the officer is first satisfied.[1] The object of this rule is to place all judgments whose liens are acquired at the same term on an equal footing upon execution. If this were not so, and the execution first delivered to the officer were given the preference, the rule as to the liens of judgments rendered at the same term would be of no avail. This provision therefore applies only to liens which are equal,[2] and not to cases where upon other principles, one party has a prior lien.[3] The statute forbidding the preference among executions above mentioned, applies only to those sued out on judgments of the same court.[4] Executions issued from different courts, though on judgments rendered at the same time, take priority as between each other, from the time of their delivery to the officer.[5]

The statute placing executions upon an equal footing as stated in this section, are not limited to the creditors whose writs are levied on the debtor's property, or in the hands of the officer at the time of sale, but embrace all whose executions are sued out within the specified time.[6]

It is the duty of the sheriff to make distribution according to the statute to the several judgment creditors in proportion to the amount of their respective demands.[7]

Sec. 913. Preference between executions.—As stated in the preceding section the statute prohibits any preference being given executions when the liens are equal, but the statute also provides that it shall not operate against or "affect any preferable lien which a judgment on which execution issued has on the lands of the judgment debtor."[8] For instance, where two writs of execution are issued out of different courts of concurrent jurisdiction, that which is first placed in the hands of the officers will be first satisfied.[9] While it may be the duty of the sheriff to levy the executions in the order which he receives

[1] Code, sec. 5382.
[2] Derckson *v.* Ried, 2 Handy, 160.
[3] Patton *v.* Sheriff, 2 O. 396; Waymire *v.* Staley, 3 Oh. 366.
[4] Meier *v.* Bank, 55 O. S. 446.
[5] *Id.*
[6] Doll *v.* Barr, 58 O. S. 113.
[7] Ryan *v.* Root, 56 O. S. 302.
[8] Code, sec. 5382.
[9] Derckson *v.* Ried, 2 Handy, 160; Meier *v.* Banks, 55 O. S. 446.

them[1] the order in which levies are made cannot in any way affect the priorities of liens; that must be determined by the court on distribution according to the priority of the liens.

Sec. 914. Indorsement of receipt of writ.—The sheriff must indorse on every writ of execution the time when he receives it.[2]

Sec. 915. Levy and sale of goods and chattels.—The writ of execution must first be levied upon the goods and chattels of the debtor, but if none are found, the officer is required to indorse thereon, "no goods," and forthwith levy the same upon the lands of the debtor.[3]

But it has been held that the statute requiring this, is directory, and strict compliance therewith may be waived by the debtor, and that it is not necessary for a debtor to be without goods and chattels to make a valid levy upon land as against creditors and subsequent creditors; and in such case it has not been deemed essential to the validity of the writ that it bear the indorsement that there were no goods.[4]

The property should be taken into actual or constructive custody of the sheriff. When an actual levy is made, the personal property is in contemplation of law in the custody of the officer, and if it is returned to, or left with, the judgment debtor, such levy is not *per se* void as against subsequent levies.[5] The making of an inventory, though often desirable, is not necessary to constitute a valid levy upon personal property.[6]

The officer is required to give ten days' notice of the sale of the goods by publication in a newspaper.[7] The statute requires publication "in a newspaper printed in the county." This has been construed to mean, in the absence of any provision to the contrary, a paper published in the English language, so that a publication in a paper printed in any other language is not a compliance with the statute.[8]

The sale must be at public auction, excepting that the court may, on good cause shown on application of either party, and notice to the other party, direct a private sale.[9] If the goods levied on are insufficient to satisfy the judgment, the officer may be commanded to levy the same on the lands, goods and chattels, or either, of the judgment debtor, as the law permits, sufficient to satisfy the debt.[10]

[1] Weber *v.* King, 7 W. L. B. 148.
[2] Code, sec. 5382.
[3] Code, sec. 5383.
[4] Coal Co. *v.* Bank, 55 O. S. 233, 250; Cook *v.* Dinsmore, 5 O. C. C. 385, 391.
[5] Murphy *v.* Swadener, 33 O. S. 85.
[6] Pugh *v* Calloway, 10 O. S. 488.
[7] Code, sec. 5385.
[8] Cincinnati *v.* Bickett, 26 O. S. 49.
[9] Code, sec. 5387.
[10] Code, sec. 5388.

Sec. 916. Appraisement of lands.—The officer making the levy is required to have the premises appraised by three disinterested freeholders, residents of the county where the lands are situate. The appraisers take an oath to impartially appraise the property upon actual view,[1] and forthwith return to the officer, under their hands an estimate of the real value of the property in money.[2] The appraisement must be under the writ upon which the sale is made. If there are divers executions levied on the same property, separate appraisements on each are unnecessary; the appraisement and sale may be upon one of them, and the money applied on all, in the order of their priority.[3] But it is not proper to sell in one case under the appraisement made solely in another. Thus, where two executions of the same date are levied on the same day on the same lands, in one case subject to the prior levy in the other, and the lands are separately appraised in both cases at a like sum, the fact that in the case in which the first levy was made, the first appraisement is subsequently set aside and a new appraisement is had at a less sum, will not enable a judgment creditor, in the judgment secondly levied, to resort to the new appraisement in the other case. The appraisement in his own case is the rule and limit of his right to sell the lands.[4] The return of the sheriff making the sale is *prima facie* evidence of the amount and nature of the appraisement.[5] The statute requires that the officer shall deposit a copy of the appraisement with the clerk of the court from which it is issued, and immediately advertise and sell the real estate.[6] This is for the purpose of affording the parties in interest an opportunity to examine the appraisement to ascertain whether it is regular. The court may for valid reasons set the same aside and order a new appraisement.[7] If two-thirds of the appraised value of the lands levied upon is sufficient to satisfy the execution and costs, the judgment will not then operate as a lien on the residue of the debtor's estate.[8]

Sec. 917. At what price land to be sold.—Land must be sold for two-thirds of the value as appraised.[9]

Sec. 918. Notice of sale of lands.—Before land taken in execution can be sold the officer (sheriff) must give public notice of the time and place of sale, for at least thirty days before the day of sale, by publication in a newspaper printed and of general cir-

[1] Actual view necessary. Tabler *v.* Wiseman, 10 W. L. J. 207.

[2] Code, sec. 5389.

[3] Douglas *v.* McCoy, 5 Ohio, 523; Daniels *v.* McBain, 2 O. S. 407.

[4] Daniels *v.* McBain, 2 O. S. 407.

[5] Wilson *v.* Scott, 29 O. S. 636.

[6] Code, sec. 5390.

[7] Ohio Life Insurance *v.* Goodin, 10 O. S. 557.

[8] Code, sec. 5391.

[9] Code, sec. 5391.

culation in the county. In a weekly newspaper, an insertion of five consecutive numbers is sufficient. In a daily newspaper, an advertisement therein once a week for five consecutive weeks, before the day of sale, each insertion to be on the same day of the week, is sufficient. The expense in the daily must not exceed that in the weekly. Sales made without such advertisements may be set aside upon motion.[1] Where an advertisement is published in a semi-weekly newspaper, it is not necessary that each insertion should be on the same day of the week.[2] If, however, an advertisement is made in a daily, it is defective, and the sale may be set aside, if it is not made as the statute directs—on the same day of the week.[3] Where an advertisement is made in a weekly newspaper it is not essential that it appear in numbers published on the same day of each week. It is sufficient if it be published in each number for five consecutive weeks, provided the first number be published for at least thirty days before the day of the sale. In this count the day of publication may be included, but the day of sale must be excluded.[4]

Sec. 919. Publication in German newspaper.—In counties in which there is published a newspaper published and printed in the German language, having a circulation of at least five hundred and fifty copies of *bona fide* subscribers, notice of sale of lands upon execution must also be published in such German language, for the same time and manner as in the English paper, provided the value of the property to be sold exceeds five hundred dollars. If there are two or more such papers printed in such county, the publication may be in either. The court may, on motion of the plaintiff or defendant, or without motion for good cause, dispense with such publication. A publication may be directed in a newspaper printed in the Bohemian language if the interests of the defendant require it. Errors or mistakes in such publications do not have the effect of delaying proceedings, or of affecting the title of the purchaser.[5]

Sec. 920. Return of the writ.—The sheriff is required to indorse on the writ his proceedings, and the clerk is required to record the same in the execution docket, which is a part of the record.[6] The writ of execution must be returned within sixty

[1] Code, sec. 5393.

[2] Lemert *v.* Clarke, 1 O. C. C. 569; s. c. 1 O. C. D. 318.

[3] *Id.*

[4] Wilson *v.* Scott, 29 O. S. 636, 641. The day on which the notice is first published may be included, and the day of sale excluded. Hagerman *v.* Building and Savings Assen., 25 O. S. 186.

[5] Code, sec. 5394.

[6] Code, sec. 5395.

days from the date thereof.[1] The court cannot extend a writ, and a sale made under a writ extended is not proper, and may be set aside.[2] The date of the return is not conclusive evidence of the time when such writ was returned to court.[3] Nor is the failure of the officer to file his return within the required time, an irregularity constituting error after confirmation of sale.[4]

Sec. 921. Purchaser in contempt for failing to pay purchase money.—Upon notice and motion of the officer making the sale, or of an interested party, the court may punish as for contempt any purchaser of real property who fails to pay the purchase money therefor.[5]

Sec. 922. Where sales take place.—All sales of lands must take place in the county in which the lands are situate, and at the court-house, unless otherwise ordered by the court.[6]

Sec. 923. Confirmation of sale.—The court examines the return of sale and finding upon examination, that the sale has been made, in all respects, in conformity to law, an entry of confirmation is to be made, and an order made directing the officer to make a deed to the purchaser. The entry directs how the proceeds are to be distributed, but the officer may retain the purchase money until the decree of confirmation and distribution is made.[7] A sheriff's deed is not valid unless the sale is approved by the court, and an order for the deed made.[8] Upon a motion for confirmation of a sale it has been held that the court can only look to the execution on which the sale was made, and the proceedings under it.[9] The court is invested with certain discretion, and even though the letter of the statute has not been complied with in giving the notice of the sale, yet if the court is satisfied that notice was published in a paper not of general circulation in the county, it may refuse to confirm the sale.[10] A mistake in the appraisement and advertisement for sale, which does not mislead the purchaser, it has been held binds the purchaser.[11] Nor is a defect in the description of the lands which does not affect the price, a ground for resisting confirmation.[12]

Long delay in procuring confirmation of sale, resulting in depreciation of the property sold, but not objected to during the

[1] Code, sec. 5418.
[2] Harland *v.* Newcombe, 2 O. C. C. 330; 1 O. C. D. 514.
[3] Conkling *v.* Parker, 10 O. S. 29.
[4] Lemert *v.* Clarke, 1 O. C. C. 569.
[5] Code, sec. 5397.
[6] Code, sec. 5404.
[7] Code, sec. 5398.
[8] Curtis *v.* Norton, 1 Ohio, 278.
[9] Buckingham *v.* Granville Alexandria Society, 2 Ohio, 360.
[10] Craig *v.* Fox, 16 Ohio, 564.
[11] Mechanic's S. & B. Assen. *v.* O'Connor, 29 O. S. 651.
[12] Wilson *v.* Scott, 29 O. S. 636.

time of delay by the purchaser, is not a good defense to an action brought against him after the confirmation, to recover the purchase money. Where a motion to confirm is made and heard without notice to the purchaser, and he afterwards makes a motion to set aside the sale, which is heard and overruled, the matters relied upon in the latter motion are considered as adjudicated.[1]

Sec. 924. New appraisement—When necessary.—When property has been twice advertised and offered for sale, remains unsold for want of bidders, the court may on motion of the plaintiff, set aside such appraisement, and order a new one, or set aside the levy and appraisement and award a new execution to issue, as the case may require. When the property is not sold upon the third advertisement, the court is authorized to direct the amount for which the same shall be sold.[2] The court is also authorized under such circumstances when the real estate has been twice offered and not sold, to order the same to be sold on time.[3]

[1] Mayer *v.* Wick, 15 O. S. 548.
[2] Code, sec. 5416.
[3] Code, sec. 5417.

V.

Appellate and Error Procedure.

CHAPTER XLIII.

TRIAL AND PRACTICE ON APPEAL.

SEC.

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Sec. 925. What courts have appellate jurisdiction.—In Ohio appeals may be taken, in all cases which are appealable, from the common pleas court to the circuit court,[1] from the probate court to the court of common pleas,[2] and from the justice's court to the court of common pleas.[3] The only courts having appellate jurisdiction are the court of common pleas and the circuit court.

Sec. 926. Cases which may be appealed to the court of common pleas from justice.—An appeal may be taken to the court of common pleas from a magistrate's court in cases where either plaintiff or defendant claims more than twenty dollars; but not from a case where the sum claimed is less than twenty dollars, if tried to a jury.[4] In all other cases not otherwise specially provided for by law, an appeal may be taken.[5] An appeal may be taken from an action of replevin without regard to the amount or value of property.[6] So may an order made by a justice improperly dismissing an action be appealed from.[7] An appeal may be taken from a judgment by default before a justice of the peace.[8] Where the plaintiff's claim before the justice is for not more than twenty dollars, and defendant files a counter-claim for more than twenty dollars, the latter may appeal, although the case was tried by a jury. The defendant is not bound to submit his counter-claim to the jury to authorize an appeal; it is enough that he filed it and sought trial before the jury, which he would have had but for the judgment of the justice.[9]

Sec. 927. Cases not appealable from justice.—An appeal cannot be taken from a judgment rendered on confession before a justice, or in an action for forcible entry and detention, or in trials for the right of property under the statutes, either levied upon, by execution, or attached.[10] Nor can an appeal be taken from a judgment rendered for a greater sum than one hundred dollars in an action for trespass to realty,[11] nor from a case in which the justice had no jurisdiction,[12] though if in such case the defendant appears in the appellate court and pleads, he thereby waives this defect and confers jurisdiction on the common pleas.[13]

[1] Code, sec. 5225–26.

[2] R. S., sec. 5934.

[3] R. S., secs. 6562, 6563, 6566.

[4] R. S., secs. 6562, 6596; Glover *v.* Moses, 13 O. 321; Perkins *v.* White, 36 O. S. 530.

[5] R. S., sec. 6583.

[6] Martin *v.* Armstrong, 12 O. S. 549; Gaiser *v.* Van Heim, 8 O. C. C. 120.

[7] Fee *v.* Iron Co., 13 O. S. 563.

[8] Goldsborough *v.* Bolenbaugh, 3 O. C. C. 583.

[9] Linkensdorfer *v.* Wentzel, 4 O. N. P. 94.

[10] R. S., sec. 6596.

[11] O'Neal *v.* Blessing, 34 O. S. 33.

[12] Nichol *v.* Patterson, 4 O. 200. See Norton *v.* McLeary, 8 O. S. 209.

[13] Harrington *v.* Heath, 15 O. 483–7; Bisher *v.* Richards, 9 O. S. 495; Van Dyke *v.* Rule, 49 O. S. 530.

Sec. 928. Appellate jurisdiction of common pleas court confined to matters within the jurisdiction of justice.—In the exercise of appellate jurisdiction by the common pleas court in cases appealed from a justice of the peace, it is confined to the jurisdiction of the justice's court.[1] Though a case appealed is within the original jurisdiction of a justice, yet if the plaintiff on appeal departs from the cause tried before the justice, and sets up another and different cause of action, which is also within the exclusive jurisdiction of the justice, it is held that the court of common pleas acquires no jurisdiction of the cause set up in the petition, although the defendant appears and pleads to the merits by filing a motion to make the petition definite and certain. A motion may be made to strike out the cause of action substituted by the departure in pleading.[2]

Sec. 929. Docketing case in cases from justice.—The clerk, on receiving a transcript on appeal from a justice, and the other papers, is required to file the same, and docket the appeal.[3] The transcript should be certified by the justice, and filed by the party appealing. It is the process by means of which the parties get before the court.[4] If a case is dismissed for failure to properly file the transcript in time, the case should be remanded to the justice to be proceeded in as if no appeal had been taken.[5]

Sec. 930. Appeals from justice—Parties and pleadings in common pleas.—The plaintiff in the magistrate's court is the plaintiff in the court of common pleas; and the parties proceed, in all respects, in the same manner as though the action had been originally brought in that court,[6] and may be prosecuted as a civil action under the code.[7] The same pleadings, therefore, must be filed as in an original case, although it has been held that the parties may, by agreement, proceed to trial upon the transcript without pleadings.[8] It matters not which party prosecutes the appeal, the plaintiff must file the petition. It is now held that it should be averred in the petition that the cause comes into the court upon appeal, as the court cannot look to the transcript for the evidence of facts necessary to appear in the petition. The court of common pleas has no jurisdiction

[1] Woolever *v.* Stewart, 36 O. S. 146.

[2] Strauss *v.* Adams, 4 O. N. P. 109. See *post*, sec. 930; Sneath *v.* Holtz, 2 Oh Dec. 423.

[3] R. S., sec. 6586.

[4] Austin *v.* Hayden, 6 Ohio, 388.

[5] Rudershauer *v.* Pagels, 14 O. C. C. 327; 8 O. C. D. 11.

[6] R. S., sec. 6587.

[7] Hill *v.* Supervisors, 10 O. S. 621; Austin *v.* Hayden, 6 O. 388.

[8] Hallam *v.* Jacks, 11 O. S. 692.

except by appeal, and it should appear that it is an appealed case.[1]

The case made by the petition on appeal in the court of common pleas must be the same as was tried upon the bill of particulars before the justice. The nature of the action cannot be changed. If this rule be violated the petition should be stricken from the files on motion.[2]

Sec. 931. Appeals from justice—Rule days.—The rule day for filing a petition on appeal from a justice in the court of common pleas, is the third Saturday after the expiration of the time limited for filing the transcript, and subsequent pleadings are filed within such times as is provided for the filing thereof in cases commenced in that court after the return day of the summons.[3]

Sec. 932. Appeals from justice—Proceedings if appeal not prosecuted.—If the plaintiff appeal and fail to file a petition, or otherwise neglect to prosecute the same to final judgment, judgment should be rendered against him.[4] And if appellant fail to deliver a transcript and other papers within the proper time, the appellee may thereafter, at the term of said court next after the expiration of the time limited for filing the same, file a transcript of the proceedings and judgment of such justice and the cause may thereupon, on motion of the appellee, be docketed; and the court may thereupon, on his application, enter a judgment in his favor similar to that entered by the justice.[5] If the defendant appeal the case, and after having filed the transcript, and the plaintiff fail to file a petition, or otherwise fail to prosecute the same, the defendant may file his answer setting up whatever claim or demand he may have against such plaintiff, and prosecute the same to final judgment.[6]

Where an appeal has been perfected, and the court has acquired jurisdiction of the parties, but no pleading having been filed within the rule days, the defendant may move to dismiss the appeal or file his answer, asking for a judgment upon the answer for failure to file his petition.[7]

[1] Hartzell *v.* Warren, 11 O. C. C. 269: 5 Ohio, (Cir.) Dec. 183. Overruling, McCullough *v.* Cramblett, 1 Ohio, (Cir.) Dec. 182; Linkensdorfer *v.* Wentzell, 4 O. N. P. 94.

[2] Sneath *v.* Holtz, 2 Ohio, Dec. 423; Austin *v.* Hayden, 6 Ohio, 388; Strauss *v.* Adams, 4 Oh. N. P. 109. See *ante*, sec. 928.

[3] R. S., secs. 6587, 6592, 6598.

[4] R. S., sec. 6590.

[5] R. S., sec. 6588.

[6] R. S., sec. 6592.

[7] Parker *v.* Haight, 7 Oh. Dec. (Cir. Ct.) 609.

Sec. 933. Cases appealable from the probate court to common pleas.—The statutes provide for appeals from the probate court to the court of common pleas from the decision of appraisers in laying out and establishing a free turnpike road,[1] and in all prosecutions in reference to canals in the same manner as appeals are allowed in civil cases,[2] in appropriation proceedings,[3] or in the allowance of claims against the estate of a decedent,[4] or from any final order, judgment or decree made by such court by any person affected thereby;[5] as a finding upon exceptions to an inventory;[6] or in admitting a spoliated will to record;[7] or from any order, decision or judgment of the probate court in settling the accounts of administrators, guardians, trustees and assignees, trustees and commissioners of insolvents; in proceedings for the sale of real estate; in proceedings with reference to the allowance to a widow, or against persons suspected of having concealed, embezzled or conveyed away property of deceased persons; in cases for the completion of contracts, or from an order or decision in the administration of insolvent's estate, or proceedings to appoint guardians;[8] or from the refusal to admit a will to probate;[9] but not from the refusal to admit an authenticated copy of a foreign will to record.[10] An appeal may be taken from an order of the probate court overruling a motion of an imbecile ward to terminate the guardianship.[11]

Sec. 934. Procedure in appeals from probate court.—In an appeal from the probate to the court of common pleas, the cause is tried, heard and decided in the same manner as though it had original jurisdiction.[12] Pleadings are not necessary in an appeal from the allowance of a claim of an executor against the estate, unless the court orders them to be filed.[13] The cause so appealed is tried, heard and determined as though the court had original jurisdiction thereof.[14]

Sec. 935. What cases may be appealed to the circuit court.—By our system of appellate procedure only those cases can be appealed from the common pleas to the circuit court in which the right to a trial by jury does not exist. In other words, the practice under the old system is preserved, and it is only cases

[1] R. S., sec. 4784.
[2] R. S., sec. 7887.
[3] R. S., secs. 2254, 2259.
[4] R. S., sec. 6101.
[5] R. S., sec. 6203.
[6] R. S., sec. 6024.
[7] R. S., secs. 5949, 5952.
[8] R. S., secs. 6407, 6331.
[9] R. S., sec. 5934.
[10] R. S., sec. 5934.
[11] Hiett *v.* Nebergall, 45 O. S. 702.
[12] R. S., sec. 6407.
[13] R. S., sec. 6101.
[14] Sayler *v.* Simpson, 45 O. S. 141, 142.

in equity which are appealable.[1] The right to appeal depends upon the same principles precisely which govern the manner of trial, which we have discussed elsewhere.[2]

Sec. 936. Appeal from order dissolving injunction.—The statute authorizes an appeal to be taken from an interlocutory order dissolving an injunction in a case in which it had original jurisdiction. Such interlocutory order dissolving the injunction is not suspended by the appeal ; that is, the injunction is no longer in force unless the circuit court or two judges in vacation on reasonable notice, make an order suspending the order of dissolution of the injunction which would leave it in force, and the injunction still in effect. Or the court or judge at the time of making the interlocutory order of dissolution, may upon good cause shown, suspend the operation of his order of dissolution for ten days, so as to enable the party to perfect an appeal.[3] The right to apply to the circuit court to suspend the order dissolving the injunction is in addition to the right of appeal.[4] The language of the statute indicates that there may be an appeal without any suspension of the order vacating the injunction. The trial court may or may not order such suspension, and the order is appealable whether the court or judge of the lower court grants such suspension or not. The party appealing may perfect the same by giving notice and entering into the undertaking, and the refusal of two judges in vacation to order a suspension of the order of dissolution will not have the effect of defeating the appeal.[5]

An appeal from an interlocutory order of the court of common pleas, or a judge thereof, dissolving a provisional injunction in an action where the ultimate remedy sought is a perpetual injunction, does not transfer the whole case to the appellate court for trial of the issues joined by the pleadings, but only for hearing upon the order appealed from.[6]

Sec. 937. Appeal dependent upon character of relief.—Whether or not an appeal may be taken depends rather upon the character of relief sought, or to which the party is entitled. It is determined by the nature of the action, and not by the form of the judgment rendered. And the nature of the action must be ascertained from the allegations, and the character of relief under them.[7] The prayer of the petition does not determine the

[1] Code, sec. 5226.
[2] *Post*, sec. 937.
[3] Code, sec. 5226.
[4] Kewish *v.* Wire, 9 Ohio Dec. 551.
[5] Kewish *v.* Wire, 9 Oh. Cir. Dec. 551; s. c. 17 O. C. C. 386.
[6] Trustees *v.* McClannahan, 53 O. S. 403.
[7] Hull *v.* Bell Bros., 54 O. S. 228.

appealability of an action, but the facts stated.[1] General rules, covering all *possible* cases which may arise, will be discussed, which may be easily applied to particular facts and cases and the method of going up solved thereby.

If a money judgment will answer the demand of the plantiff, is all that is sought and obtained, either party is entitled to a trial by jury, and no appeal can be taken.[2] Where, however, other relief is required, as the reformation of a contract, preparatory to the recovery of damages for a breach thereof,[3] or where an order of sale and distribution of the fund is required as in foreclosure of mortgage, the relief sought goes beyond a mere money judgment, and either party may appeal from the judgment against him.[4] There are four classes of cases, with rules peculiar to each class, under which all questions of appeal come, namely: 1. Where there is a single cause of action calling only for equitable relief ; 2. Where there is a legal and an equitable cause of action joined; 3. Where there is a single cause of action calling for both legal and equitable relief; and 4. Where the defendant sets up a counter-claim or set-off.

Sec. 938. Where there is a single cause of action calling for only one kind of relief.—Where there is a single cause of action asking for only one kind of relief, whether or not it is appealable depends upon the character of the action as shown by the facts alleged. The prayer of the petition does not determine the character of the action unless it be doubtful from a view of the facts just what the character of the action is.[5] A suit by a donee *causa mortis* against an administrator to establish title to notes claimed as a gift, is appealable.[6] So is an action by an administrator to sell land to pay debts, brought in the court of common pleas,[7] and an action by an attachment creditor to remove incumbrances which might affect a sale of the property,[8] and an action to quiet title,[9] and specific performance against a vendee to compel payment of purchase money.[10]

Sec. 939. Appeal when legal and equitable causes of action are joined.—It has been said that "If there be a joined for several causes of action, and an issue of fact as to either of them, which either party has a right to have tried to a jury, it

[1] Reed *v.* Reed, 25 O. S. 422, Corry *v.* Gaynor, 21 O. S. 277.

[2] Dunn *v.* Kanmacher, 26 O. S. 497; Chapman *v.* Lee, 45 O. S. 356; Brundridge *v.* Goodlove, 30 O. S. 374; Averill Coal and Oil Co. *v.* Verner, 22 O. S. 372.

[3] Rowland *v.* Entrekin, 27 O. S. 47; Ellsworth *v.* Holcomb, 28 O. S. 66.

[4] Ladd *v.* James, 10 O. S. 437; Fleming *v.* Kerkendall, 31 O. S. 568.

[5] Kinkead's Plg., sec. 46*p*.

[6] Gano *v.* Fisk, 43 O. S. 462.

[7] Metzger *v.* Meeker, 8 Am. L. Rec. 98.

[8] Voss *v.* Murray, 50 O. S. 19.

[9] Miller *v.* Cincinnati, 5 O. C. C. 583.

[10] Jones *v.* Booth, 38 O. S. 405.

is a case for error, and there can be no appeal, though one or more of the causes of action would be such as would otherwise authorize an appeal."[1]

The character of the action and the consequent method of trial will depend upon the issues as raised by the answer of the defendant. Whether a case is appealable is to be determined from the nature of the issues when it is submitted to the trial court.[2] So far as concerns the joinder of two causes of action, one legal and the other equitable, other than the enforcement of liens, there is not much to guide us among the decisions in Ohio. In the latter class of cases there is a statute which materially affects the question of the mode of trial and how to go up to a higher court, as it has been construed by the court.

It is more than likely that where there are two or more causes of action of different nature set forth by the plaintiff, the rule applicable to cases where only a single cause of action is pleaded by the plaintiff, may apply. If the matter set up by the defendant is merely a defense, it may go to the one cause or the other cause of action, or to both. But whatever the defense may be it does not affect the mode of trial or the question of appeal or error, as that depends in such case entirely upon the nature of the plaintiff's cause of action.[3]

The rule with reference to the right of trial by jury, and of appeal or error, in actions upon a note and mortgage upon real estate, or for the enforcement of liens upon real estate, adopted by the court in this State, is as follows:

When the petition asks for personal judgment upon the note, and for sale of the property, as to any issue of fact affecting the claim for a personal judgment, either party has a right to demand a trial by jury, and hence there can be no appeal.

But if personal judgment is not asked, and the court is only called upon to find the amount due upon the note or personal obligation, and to order a sale of the mortgaged premises, either party has the right to appeal, but nowhere is found any expression by the court that neither party has the right to a trial by jury in such cases where no personal judgment is asked, but issues of fact are raised as to the legal cause of action upon the note. The cases are collected in the note.[4]

[1] Ladd *v.* James, 10 O. S. 437.

[2] Grapes *v.* Barbour, 58 O. S. 669.

[3] Smith *v.* Anderson, 20 O. S. 76.

[4] If a judgment is asked upon the note and for sale of the mortgaged property, any issue of fact which affects the judgment upon this note is an issue which either party has a right to demand shall be tried by a jury. If there be no such issue of fact, or the judgment asked is simply a finding of the amount due upon the note and a sale of the property mortgaged, either party has a right to appeal. . . . When a claim upon a note for personal judgment, and a claim for sale of property conveyed by mortgage to secure the payment of the note, as to any issue of

This rule is no doubt adopted because of the provision of the code that in actions to foreclose a mortgage, or to enforce a lien for money claimed to be due, when personal judgment is asked, such proceedings shall be had, and judgment rendered thereon, as in a civil action for money only.[1] This means that the issues of fact as to such claim for money only, are to be tried to a jury. And the statute only applies when the party against whom the lien is sought to be enforced is also personally liable for the debt secured thereby.[2] The rule that the nature of the action is determined by the primary or paramount relief, and not by that which is only incidental, would seem to be confined to cases where only a single cause of action, calling for both legal and equitable relief is pleaded. But White, C. J., in an action for foreclosure and sale, without personal judgment, says: "In the present instance, the action is not for the recovery of money, although money is the ultimate object sought. The action is not in the nature of a common-law action; but in the nature of a bill in equity. Its primary object is the enforcement of the lien of the mortgage by subjecting the premises to sale to pay the mortgage debt."[3]

Whether or not the statute providing that actions for the enforcement of liens where personal judgment is asked shall proceed as in a civil action for the recovery of money only, is intended to limit the trial of issues of fact raised as to the legal cause of action, to the jury, only when personal judgment is asked, does not seem to have been decided.

Sec. 940. Appeal when there is a single cause of action calling for legal and equitable relief.—Where there is a single cause of action contained in a petition in which both legal or equitable relief is asked, the nature of the action and the question of appeal or

fact affecting the claim to a personal judgment, there is a right to demand a trial by jury, and hence it cannot be appealed. Ladd *v.* James, 10 O. S. 438.

Where the prayer for personal judgment is withdrawn, and the court proceeds to find the amount due, the mortgagor may appeal. Grapes *v.* Barbour, 58 O. S. 669.

Where the prayer is for an ordinary decree of foreclosure and order of sale, the action is one for relief other than money only, and although an issue of fact be joined as to the legal cause, as payment, neither party is entitled to demand a jury, and either party may appeal. Alsdorf *v.* Reed, 45 O. S. 653.

In an action for personal judgment and foreclosure, where the only issue was the validity of the debt, it is a case for the jury, and not appealable. Scott *v.* Hewett, 7 O. C. C. 5; Mitchell *v.* Drake, 7 O. C. C. 308. If personal judgment is asked, the case is a jury case. Keller *v.* Wenzell, 23 O. S. 579.

[1] Sec. 5021.

[2] Fleming *v.* Kerkendall, 31 O. S. 568.

[3] Fleming *v.* Kerkendall, 31 O. S. 568. In this case it was held that the grantee of mortgaged property who is not personally liable for the debt, may appeal from the decree of foreclosure notwithstanding prayer for personal judgment is asked against the mortgagor.

error is determined by the relief which must first be granted, or which is paramount, and not by that which is incidental or the ultimate relief, that which is necessary to carry out the principal relief. Where the action is primarily for money only, or for the recovery of specific real or personal property, and some equitable relief is asked and is necessary, it is not an appealable action.[1] But where the paramount primary relief asked for is solely within the equitable jurisdiction of the court and in order to administer full and complete relief it becomes necessary to grant legal relief, then it is an appealable action.[2] For example, where the judgment prayed for is money, either party is entitled to a jury trial, notwithstanding numerous items of account are involved in the issues.[3] And where the primary demand is for the reformation of a contract, and a personal judgment for money is asked, the case is appealable.[4] So is an action for injunction, and incidentally for damages appealable;[5] or a suit for an accounting and judgment for the amount ascertained;[6] or an action between cotenants for rents and profits;[7] or an action to set aside fraudulent settlements and for a just accounting;[8] or an action for the recovery of money, where the right to recovery depends upon principles of subrogation;[9] or an action for the recovery of money and to marshal liens;[10] or an action to enjoin waste, and for an account;[11] an action for money based on fraud and conspiracy and appropriation of funds, is a case for the jury, and not appealable, although discovery and account is asked to ascertain the amount. The latter relief is incidental.[12]

Sec. 941. When defendant merely sets forth a defense.—A defense is a negative resistance; it sets forth some matter going to show why plaintiff should not recover upon the cause of action plead by him. If an equitable defense is set up to a legal cause of action, the case is tried according to the nature of the plaintiff's cause of action.[13] There is a material distinction between a defense, and new matter demanding affirmative relief. The latter constitutes a cause of action in itself, on

[1] Dunn *v.* Kanmacher, 26 O. S. 497; Gunsaullus *v.* Pettit, 46 O. S. 27; Brundridge *v.* Goodlove, 30 O. S. 374; Chapman *v.* Lee, 45 O. S. 356.

[2] Rowland *v.* Entreken, 27 O. S. 47; Black *v.* Boyd, 50 O. S. 46; Barndt *v.* Albertson, 51 O. S. 569; McCrory *v.* Parks, 18 O. S. 1; Alsdorf *v.* Reed, 45 O. S. 653.

[3] Averill Coal & Oil Co. *v.* Verner, 22 O. S. 372.

[4] Rowland *v.* Entreken, 27 O. S. 47; Ellsworth *v.* Holcomb, 28 O. S. 66. There is only one cause of action in such case.

[5] Converse *v.* Hawkins, 31 O. S. 29.

[6] Black *v.* Boyd, 50 O. S. 46.

[7] Conard *v.* Conard, 38 O. S. 467.

[8] Reed *v.* Reed, 25 O. S. 422.

[9] P. C. & St. L. Ry. *v.* Schmidt, 8 O. C. C. 355.

[10] Means *v.* Clark, 7 O. C. C. 276.

[11] Jenks *v.* Langdon, 21 O. S. 362.

[12] Chapman *v.* Lee, 45 O. S. 356.

[13] Smith *v.* Anderson, 20 O. S. 76.

which a separate action might be maintained. The former being merely a defense, cannot draw to itself a mode of trial different from that prescribed for the cause of action to which it relates.[1] Consequently in such cases, whether it is a case for appeal or error will depend upon the nature of plaintiff's cause of action.

Sec. 942. Appeal when defendant sets up counter-claim or set-off.—When a defendant sets up in his answer a counter-claim or set-off, the mode of trial and the method of going up to a higher court, depend upon wholly different grounds.

It matters not what the nature of the plaintiff's cause of action is, if the counter-claim or set-off will, if it be found that the defendant is entitled to have the same allowed, extinguish the claim of the plaintiff, then that disposes of the whole case, and whether it is to be tried to court or jury, or may be taken up on error or appeal, depends upon the character of the counter-claim or set-off; if it is equitable, it is a case for appeal;[2] if it is legal then it must, if the defendant demands, be tried by a jury and must go up on error.[3] Where a defendant sets up such matter, it is proper before trying the case on the original petition, to dispose of the matter set up in the cross-petition.[4]

For example, where in an action for trespass the defendant sets up his equitable ownership of the land and asks for a decree against plaintiff for legal title, the issues upon such cross-petition are purely equitable, and from a decree rendered against the plaintiff he may appeal.[5] So where the defendant in an action for breach of warranty in a deed, sets up a mutual mistake and asking reformation.[6] Where a defendant in an action to recover a balance due on a building contract, asks for reformation of the contract, he may appeal, notwithstanding the plaintiff's case was submitted to a jury which found in favor of the plaintiff. Such appeal would not open up matter submitted to a jury.[7]

Sec. 943. Contribution.—Whether or not an action for contribution is appealable depends upon the circumstances of the particular case. It is said that the liability existing between co-sureties is always to be settled upon principles of equity and justice. In some instances, from the nature of the case, the par-

[1] Gill *v.* Pelkey, 54 O. S. 348, 360.

[2] Buckner *v.* Mear, 26 O. S. 514; Taylor *v.* Leith, 26 O. S. 427; Railroad Co. *v.* Morris, 10 O. C. C. 502; Massie *v.* Stradford, 17 O. S. 597; Rankin *v.* Hannan, 37 O. S. 113.

[3] Salladay *v.* Webb, 2 O. C. C. 553.

[4] Dodsworth *v.* Hopple, 33 O. S. 16.

[5] Massie *v.* Stradford, 17 O. S. 597.

[6] Taylor *v.* Leith, 26 O. S. 426; Buckner *v.* Mear, 26 O. S. 514; Sheeful *v.* Murty, 30 O. S. 50.

[7] Gladieux *v.* St. L. Parish, 17 O. C. C. 696.

ties are entitled to an account, to determine the extent of the liability. In a suit by one against several co-sureties, where the object is to enforce an account to determine the equities between them, and without a multiplicity of action, to settle the respective rights of each in one case, and as a result of the settlement, to obtain such orders and judgments as may be equitable and just, the action then is clearly equitable and appealable.[1] This doctrine is very much doubted by some, and it has been held that where there are no complications in equity and the amount sought to be recovered is definite and certain without an accounting, then it is a case for the jury and not appealable.[2] It is more than likely that actions to recover money by way of contribution are legal rather than equitable, as there is generally no equitable relief necessary in such cases.

Sec. 944. Can be taken only from final orders and judgments, and other interlocutory orders specially provided for.—Appeals can only be taken from a final judgment or order in a *civil action* rendered in the court of common pleas, of which that court has original jurisdiction, and from an interlocutory order of the court, or the judge thereof, dissolving an injunction, in a case in which the court had original jurisdiction.[3]

Sec. 945. What is a final judgment with reference to appeals.—A final judgment or decree is one which disposes of the whole merits of a case, and leaves nothing further for the consideration of the court. When a cause is retained for further action it is interlocutory.[4] A decree upon a hearing of exceptions to a master's report, confirming the same in a modified form;[5] or an order in foreclosure proceedings upon an answer and cross-petition of the wife of the mortgagor granting her an allowance in lieu of a homestead, making it a preference over another lien,[6] or a decree of confirmation of sale in foreclosure,[7] or an order or judgment in partition proceedings ascertaining and declaring the portion of each of the parties and ordering the shares to be apportioned to their several owners;[8] or an order

[1] McCrory *v.* Parks, 18 O. S. 1. The case of Daum *v.* Kehnast, 9 Oh. Cir. Dec. 867, was treated as a suit in equity, as the petition prayed for an accounting in equity between the co-sureties.

[2] Koelsch *v.* Mixer, 5 O. C. C. 404.

[3] Code, sec. 5226. It does not extend to cases appealed from a justice to the common pleas. Norton *v.* McCleary, 8 O. S. 205; Clark *v.* Hanna, 8 O. S. 199.

[4] Kelley *v.* Stanberry, 13 Ohio, 408, 421. When further action of the court is necessary to give full relief, a decree is not final. Teaff *v.* Hewitt, 1 O. S. 511, 520.

[5] Evans *v.* Dunn, 26 O. S. 439.

[6] Spence *v.* Basey, 34 O. S. 42.

[7] Hey *v.* Schooley, 7 Oh. (Pt. 2) 48; 9 O. S. 366.

[8] McRoberts *v.* Lockwood, 49 O. S. 374.

upon demurrer to the petition and dismissal of the action,[1] are illustrations of final orders.

Sec. 946. What are not final orders and not appealable.—An order appointing a receiver,[2] or overruling a demurrer,[3] or a decree determining the rights of parties to an account and referring the cause to a master,[4] and orders in partition subsequent to the decree ordering the partition and ascertaining the shares, such as confirmation of sale, being only to carry out the final order,[5] or an order striking a case from the docket,[6] or an order fixing the amount of an appeal bond,[7] are interlocutory and not appealable.

Sec. 947. In a civil action—Judgment or final order in—Meaning of.—The code says that an appeal may be taken from a judgment or final order in a *civil action* rendered by the common pleas court in which it has original jurisdiction.[8] From this phraseology it is evident that the judgment or final order must be in a *civil action;* the thing so appealed must be a civil action, and it is *the action so appealed* which is to be again tried.[9] If anything is the subject of an appeal which is not a civil action, it must be by special provision of statute.

The final order in the statute regulating proceedings in error, is not precisely like the final order contemplated by the statute governing appeals.[10] The final order in appeals is in a civil action, while the final order in error is one not alone in an action, but one also in a special proceeding, or upon a summary application in an action.[11]

The term "civil action" not only embraces actions at law and suits in equity, but also some of the statutory proceedings, as partition.[12] *Quo warranto* is made a civil action by statute.[13] It is said that the civil action of the code is a substitute for all such judicial proceedings as were previously known, either as actions at law or suits in equity, and does not embrace proceedings in mandamus.[14] Upon this theory one circuit court in Ohio held that mandamus not being a civil action, and because the

[1] Rush *v.* Rush, 29 O. S. 440.

[2] Railroad Co. *v.* Varnum, 10 O. S. 622.

[3] Baldwin *v.* Creed, W. 729.

[4] P. C. & St. L. Ry. *v.* Railway Co., 3 Oh. Fed. Dec. 374.

[5] Jordon *v.* Jordon, 4 Oh. Cir. Dec. 290; McRoberts *v.* Lockwood, 49 O. S. 374; Reeves *v.* Skennett, 13 O. S. 574.

[6] Evans *v.* Iles, 7 O. S. 234.

[7] State *v.* Goeble, 1 Ohio Cir. Dec. 307.

[8] Sec. 5226.

[9] Brinkerhoff, J., in Taylor *v.* Fitch, 12 O. S. 169, 172.

[10] C. S. & C. R. Co. *v.* Sloan, 31 O. S. 1, 9.

[11] Code, sec. 6707.

[12] Stableton *v.* Ellison, 21 O. S. 527; Rush *v.* Rush, 29 O. S. 440. See Kinkead's Plg., sec. 3; Mack *v.* Bonner, 3 O. S. 367.

[13] R. S., sec. 6760.

[14] Chinn *v.* Trustees, 32 O. S. 236.

statute provides that only judgments and final orders in civil actions are appealable, was not appealable.[1] Other circuit courts hold that a party may appeal from a final judgment rendered by the court of common pleas in mandamus,[2] and in support of their decision cite a reported and unreported decision of the supreme court to the effect that a mandamus proceeding is appealable.[3] An action to impeach a decree for fraud,[4] a proceeding by a widow for the assignment of dower,[5] and an action to construe a will[6] are civil actions and appealable.

Sec. 948. Other cases appealable to the circuit court.—An appeal may be taken in an action to stay waste and compel an account;[7] or from an action for an accounting among sureties;[8] or of rents and profits between co-tenants;[9] or from a decree entered upon the hearing of a master's report;[10] or from a final judgment in a suit to enforce the allowance of a claim by an assignee of an insolvent debtor;[11] or from a judgment enforcing a lien for an assessment;[12] or from a decree reforming a contract, though money judgment be demanded.[13]

Sec. 949. Appeal in divorce.—The statute authorizes an appeal to be taken from an order dismissing a petition in divorce proceedings without a final hearing, or from a final order or judgment granting or refusing alimony.[14] The dismissal of a petition defective because it does not state a cause of action, has been held not to be dismissal without a final hearing, from which an appeal may be taken.[15] An appeal lies from a final decree awarding alimony, and not from an order granting alimony *pendente lite.*[16]

Sec. 950. Who may appeal.—The statute permits "a party or other party directly affected" by a judgment to appeal therefrom.[17] How a party may be directly affected so as to have the right to take an appeal must depend upon the circumstances and substantive rights of parties in particular cases. The right

[1] State *ex rel v.* Smiley, 14 O. C. C. 660. See Coghlin *v.* Toledo, 4 Ohio Cir. Dec. 207.

[2] State *v.* Delaware, 8 Ohio Cir. Dec. 244; State *v.* Commissioners, 15 O. C. C. 40; State *v.* Bowersock, 1 Ohio Cir. Dec. 75.

[3] Dutten *v.* Hanover, 42 O. S. 215. Spelling on Ex. Rem., sec. 1711, says it is appealable as other civil actions. In Nebraska it can only be taken up on error. State *v.* Lancaster, 13 Neb. 223.

[4] Coates *v.* Bank, 23 O. S. 415.

[5] Corry *v.* Lamb, 43 O. S. 390.

[6] R. S., secs. 6202, 6203.

[7] Jenks *v.* Langdon, 21 O. S. 362.

[8] McCrory *v.* Parks, 18 O. S. 1.

[9] Conard *v.* Conard, 38 O. S. 467.

[10] Evans *v.* Dunn, 26 O. S. 439.

[11] Bank *v.* Little, 4 O. C. C. 195.

[12] Corry *v.* Gaynor, 21 O. S. 277.

[13] Ellsworth *v.* Holcomb, 28 O. S. 66.

[14] Code, sec. 5706.

[15] Radcliff *v.* Radcliff, 15 O. C. C. 284.

[16] Taylor *v.* Taylor, 25 O. S. 71.

[17] Code, sec. 5226.

of persons to be made parties to an action even for the purpose of taking an appeal for the protection of their rights, must be determined according to the law of parties. It has been held that a judgment ordering the cancellation of a lease of a railroad, executed by its owner to another company, is a judgment directly affecting a stockholder of the lessor company, so as to confer the right upon such stockholder to take an appeal when the company refuses to do so.[1]

Sec. 951. How an appeal is taken—Notice, bond, &c.—A party desiring to take an appeal to the circuit court must within three days after the judgment or order is entered, enter on the records a notice of appeal, and within thirty days after the entering of such judgment or order give an undertaking.[2] The time runs from the date of entering the judgment or decree on the journal.[3] A transcript of all the docket and journal entries in the common pleas is then filed with all the original papers in the circuit court. It is made the duty of the clerk to transmit the transcript and papers to the circuit court. This he should do when the bond is filed, on or before the first day of the term thereof next after the appeal is perfect.[4] In cases when no bond is required, the transcript should be transmitted at the expiration of thirty days from entering the judgment or order.[5] This perfects the appeal.

Failure on the part of the clerk to file the papers in time, can in no way prejudice the party appealing.[6]

Sec. 952. Notice of appeal to circuit court—Requirements.—The statute provides that notice of intention to appeal must be entered on the record within three days after the judgment or order is *entered.*[7] It is usually entered in the entry of the judgment or order. This requirement is essential to the perfection of an appeal. The words at the close of the entry: "thereupon came the defendant and declared his intention to appeal this case to the circuit court," was held sufficient in form and substance.[8] The notice must be entered on the journal of the court during the term,[9] it not being sufficient to merely enter it upon the docket,[10] or upon the calendar of the judge,[11]

[1] Henry *v.* Jeanes, 47 O. S. 116.
[2] Code, sec. 5227.
[3] State *v.* Seward, 9 Oh. Cir. Dec. 168.
[4] Code, sec. 5235.
[5] Code, sec. 5228.
[6] Hirsh *v.* Kilsheimer, 5 Ohio Cir. Dec. 551.
[7] Code, sec. 5227, 16 O. C. C. 443.
[8] Layer *v.* Schaber, 57 O. S. 234.
[9] Sec. 5227.
[10] Moore *v.* Brown, 10 Ohio, 198; Bank *v.* Bowsher, 8 Ohio Cir. Dec. 514; 15 O. C. C. 114.
[11] Bank *v.* Bowsher, 15 O. C. C. 114; Humphrey *v.* Berchtold, 4 Ohio Dec. Re. 169.

or to leave it with the clerk at his residence.[1] An omission to enter a notice of an intention to appeal cannot be cured by a *nunc pro tunc* entry.[2]

Sec. 953. Same—Notice where several parties appeal.—Where several parties in one action desire to take an appeal, it is necessary that all of the parties give notice of appeal.[3] Where an appeal has been taken by one or more parties to an action, a motion should not be entertained to dismiss others who have not given notice nor appeared upon appeal.[4] Where one of several parties united in interest, against whom jointly a judgment is rendered, takes an appeal, it takes up the whole case. Whether in such case it is necessary for all the parties to give a joint notice does not seem to have been decided, though it was held in such case that the giving of bond by one of the parties was sufficient for all.[5] Where the interest of parties are separate and distinct from others, any one may appeal and in such cases it is clear that separate notices should be given by all who desire to appeal.[6]

Sec. 954. Notice in appeals from probate court.—In an appeal from the probate court to the common pleas where the party appealing must give a bond, it appears not to be necessary to give a notice of an intention to appeal. This would seem to apply to those who are adverse to a personal representative.[7] But a party in a fiduciary capacity, in which he has given bond, must give a written notice to the court of his intention to appeal within the time limited for giving bond.[8] So a party taking an appeal in appropiation proceedings must within ten days after the final order file a notice of his intention to appeal.[9]

Sec. 955. No notice necessary in appeals from justice.—It does not appear to be necessary in an appeal from a justice's court to give a notice of appeal.[10]

Sec. 956. The bond, in appeal to circuit court—Time within which filed.—The party appealing must file an appeal bond within thirty days after the judgment is entered,[11] and jurisdiction is not acquired by the appellate court unless the bond is filed.[12]

[1] Taylor *v.* Wallace, 2 W. L. B. 115.

[2] Bank *v.* Bowsher, 15 C. C. 114; s. c. 8 Ohio Cir. Dec. 513.

[3] Means *v.* Clark, 7 O. C. C. 276. See Hirsch *v.* Kilsheimer, 5 Oh. Cir. Dec. 551.

[4] Barr *v.* Chapman, 7 O. C. C. 365.

[5] Ewers *v.* Rutledge, 4 O. S. 210. In this case a joint notice was given.

[6] Code, sec. 5232.

[7] R. S., sec. 6408.

[8] *Id.*

[9] R. S., sec. 2255.

[10] R. S., sec. 6408; Alban *v.* Evans, 2 Oh. Dec. 298.

[11] Code, sec. 5227.

[12] Bradley *v.* Sneath, 6 O. 491; 595.

A bond executed within thirty days after an additional term, but not within thirty days after the term at which it is rendered, is not in time.[1] In computing the time within which a bond must be filed, the first day should be excluded and the last included.[2] The recitals of a bond cannot be taken as conclusive proof of the date of the entry of the judgment.[3] A deposit in bank cannot be taken in lieu of a bond.[4]

The true date of a decree appealed from is the date of the entry upon the journal, and not the date of the oral announcement by the court; the party may perfect an appeal within the statutory period after such entry.[5]

Sec. 957. Same, when no bond required.—A party in a trust capacity, who has given bond, is not required to give bond in taking an appeal.[6] A non-resident executor should be required to give bond.[7] In an appeal in the interest of a trust no bond is required.[8] But when one who sustains a fiduciary relation, appeals from a judgment affecting adversely his own pecuniary interests, he must give bond.[9]

Sec. 958. Bond in cases appealed from justice.—The bond in cases appealed from a magistrate's court must be given within ten days from the rendition of the judgment, in a sum double the amount of the judgment and costs.[10] Where the tenth day falls on Sunday, the bond may be given on the Monday following under Sec. 4951, R. S.[11]

Sec. 959. Bond in cases appealed from the probate court.—In cases appealed from the probate court in some cases[12] the bond must be filed within twenty days from the date of the order appealed from.[13] If from tha allowance or rejection of a claim of an executor or administrator, the bond must be filed in twelve days,[14] if from appropriation proceedings, within twenty days[15] from the order appealed from.

Sec. 960. Amount of bond.—When the action is personal against a party for the payment of money only, the amount of

[1] Harris *v.* Gest, 4 O. S. 469.
[2] Bushong *v.* Graham, 4 O. C. C. 138.
[3] Hoagland *v.* Schnorr, 17 O. S. 30.
[4] Bank *v.* Street, 16 O. S. 1.
[5] State *ex rel v.* Seward, 9 O. C. D. 168.
[6] Code, sec. 5228.
[7] Work *v.* Massie, 6 O. 503; Dennison *v.* Talmage, 29 O. S. 433.
[8] Kennedy *v.* Thompson, 6 O. C. C. 446, 448.
[9] R. S., sec. 6408; Collins *v.* Millen, 57 O. S. 289.
[10] R. S., secs. 6584, 594.
[11] Meyers *v.* Seinsheimer, 5 O. N. P. 281.
[12] R. S., sec. 6407.
[13] R. S., sec. 6408.
[14] R. S., sec. 6101.
[15] R. S., sec. 2255.

the bond must be double the amount of the judgment. In other cases it must be fixed at such sum as will be sufficient to cover the probable loss, damage or injury which the adverse party may sustain by the delay, and costs and damages awarded in the appellate court.[1] The law making it the duty of the trial court at the time of the rendition of the judgment or decree in certain cases, to ascertain and fix the penalty of the appeal bond, to be given in the event of an appeal, requires this act to be performed by that court without the motion of either party in the cause. The omission of the court to do this act does not deprive a party of his appeal when he has, by giving notice and executing an appeal bond, done all upon his own part which the law requires, to entitle him to the appeal. In such a case the appellant should give his bond with surety to the approval of the clerk, or one of the judges.[2]

Sec. 961. Condition of bond.—The condition of the bond is to the effect that the party appealing will abide and perform the order and judgment of the appellate court, and shall pay all money, costs and damages awarded.[3] A condition may be good if it substantially complies with the terms of the statute and covers all the stipulations which in any event may inure to the benefit of the appellee.[4]

Sec. 962. To whom bond payable.—The bond must be payable to the adverse party, or otherwise, as may be directed by the court, where conflicting interests of the parties require it.[5] The adverse party need not be specially named or referred to in the body of the undertaking.[6]

Sec. 963. Who approves bond.—The bond may be approved by the clerk or a judge of the court.[7]

Sec. 964. Amendment or renewal of bond.—The circuit court is authorized where a surety upon the bond removes from the State, or for any cause rendering it insufficient, upon motion to order a change or renewal of a bond, or that a new one be given.[8] If the order be complied with, the case may be heard; if not, the appeal should be dismissed.[9]

Sec. 965. When execution stayed.—The court may on motion of the party entering notice of appeal, on such reasonable terms

[1] Code, sec. 5230.
[2] Hubble *v.* Renick, 1 O. S. 171.
[3] Code, sec. 5231.
[4] Creighton *v.* Harden, 10 O. S. 579.
[5] Code, sec. 5231.
[6] Job *v.* Harlan, 13 O. S. 486.
[7] Code, sec. 5227.
[8] Code, sec. 5233.
[9] *Id.*

as may be necessary for the security of the adverse party, direct execution to be stayed for thirty days.[1] This suspends the execution of the judgment until the time expires for filing the bond and gives the party the full time allowed by statute for entering into the same.

Sec. 966. Judgment suspended when bond filed.—When the appeal bond is properly given the judgment is thereby suspended.[2]

Sec. 967. Injunction not suspended without order.—If any part of the judgment appealed from be an injunction, the same is not suspended unless the circuit court or two judges thereof, on reasonable notice to the adverse party, make an order suspending the same.[3]

Sec. 968. Lien of judgment not destroyed.—The lien of the judgment on real estate of appellant created by the judgment is not removed or vacated by the appeal, but remains until the final termination of the cause.[4]

Sec. 969. Filing a transcript.—When the proper bond is filed and approved, to perfect the appeal, it is made the duty of the clerk, in appeals to the circuit court, to forthwith make an authenticated transcript of the docket and journal entries, and of the final judgment in the cause appealed, which transcript is to be filed with the clerk of the circuit court, on or before the first day of the term thereof next after the appeal is perfected.[5] Where no bond is required at the expiration of thirty days from the entering of the judgment or order upon the journal, the clerk is required to make a transcript, which, together with the papers and pleadings filed in the cause, he shall transmit to the clerk of the circuit court.[6]

The transcript from a magistrate's court must be filed on or before the thirteenth day from the rendition of the judgment.[7] If the thirtieth day falls on Sunday, the transcript cannot be filed on the next succeeding day.[8] In appeal from the probate court to the court of common pleas, the transcript should be filed on or before the second day of the term of that court next after an undertaking or notice is given.[9] The appellant must attend to the filing; it is not the duty of the probate

[1] Code, sec. 5234.
[2] Code, sec. 5235.
[3] Code, sec. 5235; McClung *v.* Coal, &c., Co., 7 O. C. C. 182.
[4] Code, sec. 5236.
[5] Code, sec. 5235.
[6] Code, sec. 5228.
[7] R. S., sec. 6585.
[8] McLees *v.* Morrison, 29 O. S. 155.
[9] R. S., sec. 6409.

judge,[1] and in appropriation proceedings the transcript must be filed within thirty days after the date of the undertaking or the filing of the notice of the appeal.[2]

The filing of the transcript within the time fixed is a jurisdictional fact, and unless it be actually done, the appellate court is without jurisdiction.[3]

Sec. 970. Appeals to circuit court—New pleadings.—No additional or new pleadings are required in a case appealed from the court of common pleas to the circuit court, but the trial is there conducted in the same manner and upon the same pleadings as in the lower court, unless the circuit court permits or orders other pleadings or amendments to be filed.[4] The terms of the statute are plain and mean that upon an appeal the case must be tried upon the pleadings as they stood below.[5] The statute does not prevent or prohibit any party who is in default for a pleading in the court below from obtaining leave in a proper case to file such pleadings after the appeal is perfected.[6]

Sec. 971. Amendment upon appeal—General power of.—While the court has power to permit pleadings to be altered and amended, there are certain limits upon this power. Justice Swan, in *Grant v. Ludlow*,[7] has well said: "But there is, undoubtedly, a limit to the power of the appellate court in permitting pleadings to be altered and new parties to be made, arising out of the nature of original and appellate jurisdiction. An appellate court acts upon a suit already commenced and pending. It cannot originate an action. And hence the amendment of pleadings in the appellate court cannot be permitted so as to substitute for the cause of action originally brought a new and different cause of action for the determination of the appellate court. But it not unfrequently happens, especially in equity cases, that facts and allegations necessary to determine the subject-matter of the original cause of action have been omitted in the pleadings below, or the cause of action imperfectly stated. Such amendments have been heretofore allowed on appeals in this State, and when the collateral facts in equity suits make it necessary to bring in a new party, it has been allowed. Such amendments are made for the purpose of settling and fully determining the cause of action appealed."

The same general rules governing amendments applies to amendments upon appeal. Application to the appellate court

[1] *In re* Sears, 5 Oh. N. P. 116.
[2] R. S., sec. 2257.
[3] *In re* Sears. 5 Oh. N. P. 116.
[4] R. S., sec. 5225; Search *v.* Pence, 7 O. C. C. 540; 54 O. S. 641.
[5] *Id.*
[6] *Id.*
[7] 8 O. S. 1.

for leave to amend is addressed to the sound discretion of the court as in other cases.[1]

A party on appeal may obtain leave to amend to perfect his allegations by setting out some matters essential to his cause.[2]

Sec. 972. Amendments bringing in new parties.—It being the general rule that the power of granting amendments in furtherance of justice exists in the appellate court as in a court of original jurisdiction, it follows that amendments may be made bringing in new parties, if such could have been done in the lower court; new parties may be brought in, and their rights adjudicated as effectually as if they had been parties to the action in the court of common pleas.[3] For example, persons who claim ownership in lands sought to be partitioned, who were not parties below, may be made parties in the appellate court.[4] But where an appeal does not bring up all the parties, those who did not appeal have no standing in the appellate court and cannot be allowed to file pleadings, or to present evidence.[5]

But an amendment bringing in new parties which would wholly change the nature of the cause cannot be allowed under the general rule covering this matter.

Sec. 973. Amendment changing cause of action.—The general rule of pleading governing the matter of granting leave to amend does not permit an amendment to be made which will have the effect of changing the cause of action.[6] One cannot change the character of an action by amendment as by changing an action at law into a suit in equity, or *vice versa.*[7]

In an appeal from a magistrate's court the plaintiff cannot be permitted to amend so as to change his cause of action to one not within the jurisdiction of the justice,[8] as by changing an account increasing the demand,[9] although the parties may in such cases submit themselves to the jurisdiction of the court.[10]

Sec. 974. Dismissal of appeal.—If the appellate court has no jurisdiction over the cause appealed, it can only dismiss the same, leaving the judgment of the court in force.[11]

[1] Brock *v.* Bateman, 25 O. S. 609.

[2] Gladieux *v.* Parish, 8 Oh. Cir. Dec. 490.

[3] Mathers *v.* Cincinnati Ry. Tunnel Co., 5 Ohio Dec. 592; 8 Ohio St. 28; 20 O. S. 38; 12 O. S. 11; 48 O. S. 457; Bausch *v.* McConnell, 13 O. C. C. 640.

[4] Barr *v.* Chapman, 5 O. C. C. 69; 4 Oh. Cir. Dec. 638.

[5] *Id.*

[6] Kinkead's Plg., sec. 127.

[7] Nelson *v.* Kennedy, 2 Oh. Cir. Dec. 671.

[8] Van Dyke *v.* Rule, 49 O. S. 530.

[9] Bickett *v.* Garner, 21 O. S. 659; Woolever *v.* Stewart, 36 O. S. 146.

[10] Van Dyke *v.* Rule, *supra.*

[11] Stoffregen *v.* Biederman, 3 Ohio Cir. Dec. 347; Jordon *v.* Jordon, 4 Oh. Cir. Dec. 290.

An appeal in the circuit court cannot be dismissed on the ground that the petition does not contain a cause of action when it is disposed of upon that ground in the common pleas; the party appealing has the right to have the judgment of the circuit court upon the demurrer, and if the judgment is against him, he may be granted leave to amend.[1]

Sec. 975. Consolidation of separate appeals.—Where several or separate judgments have been rendered are rendered against several persons in a case which has been appealed, it is but the exercise of familiar jurisdiction to order them consolidated and no substantial prejudice results therefrom.[2]

Sec. 976. Nature of trial on appeal.—The statute provides that the trial in the circuit court shall be conducted in the same manner as in the common pleas court.[3] As matter of fact according to the general course of practice the parties agree that a case may be heard upon appeal upon the transcript of evidence as taken by the stenographer in the court below. But the appeal transfers the case into the appellate court to be tried *de novo* in the same manner as was tried in the court of original jurisdiction unless the same be changed by agreement of parties, as above. The appellate court considering the case upon appeal *de novo* is not concerned with the decision of the court below as to whether it was right or wrong.[4]

Sec. 977. The mandate.—The circuit court may either enforce a final order or judgment by process issued therefrom, or remand the same to the court of common pleas for execution or other process. The clerk is required to certify the same to the common pleas court, where it shall be entered upon the journal; and the judgment or order so entered, unless otherwise directed, shall, for the purpose of execution and other process, stand as the judgment of the common pleas court.[5] The mandate cannot be impeached in the lower court.[6]

[1] Rush *v.* Rush, 29 O. S. 440.

[2] White *v.* Woodward, 44 O. S. 367; Goodwin *v.* Van Wert Co., 41 O. S. 399.

[3] Code, sec. 5225.

[4] Brewster *v.* Anderson, 1 Oh. Cir. Dec. 268.

[5] Code, sec. 5239.

[6] Stevenson *v.* Morris, 37 O. S. 10.

CHAPTER XLIV.

ERROR--PRACTICE IN THE COMMON PLEAS, CIRCUIT AND SUPREME COURTS.

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SEC. 978. Preparation for going up on error.—Those who have had experience know when and how to prepare for going up on error. The law governing exceptions, and new trials and the steps necessary to take the case up on error must be familiar; these subjects have been discussed in separate chapters.[1] Those who have not had the experience must remember that they must be on the alert to save their exceptions whenever and wherever necessary, as one must commence to prepare for going up on error the moment the trial begins. If any complaint is made to the impaneling of the jury, the examination of the juror on *voir dire*, the action of the court and the exceptions thereto, must be shown by bill of exceptions.

If evidence has been improperly refused or admitted, the same with exceptions to the ruling of the court thereon, must be brought up by a bill of exceptions.

If it be claimed that the court gave an erroneous charge to the jury, a general exception should be noted thereto and the same preserved in the bill of exceptions. And if requests to charge have been refused, exceptions must be noted and the same embraced in the bill of exceptions; and if the court has failed to charge in any particular, a request must be made covering such point and exception noted to the ruling of the court.

SEC. 979. Jurisdiction of the common pleas court in error.—A judgment rendered or final order made by a probate court,

[1] New Trial—Bills of Exceptions.

justice of the peace, or any other tribunal, board or officer exercising judicial functions, and inferior in jurisdiction to the court of common pleas, may be reversed, vacated or modified by the court of common pleas.[1] This will include proceedings and final orders of township trustees and county commissioners in establishing ditches and roads, and other boards exercising similar judicial functions.[2] An order of a justice of the peace in discharging or refusing to discharge an attachment may be reviewed on error by the court of common pleas, and for that purpose a bill of exceptions may be taken. But the weight of the evidence will not be considered or the judgment of the court thereon disturbed.[3] Error lies at once without waiting for the suit to be finally determined.[4] But if there was no evidence tending to sustain the ruling it may be reversed for this reason.[5] And so may a judgment of forcible entry and detainer by a justice be reviewed.[6] But an order of a justice overruling a motion to dismiss an action is not reviewable.[7]

The common pleas court has no authority to entertain a petition in error to reverse a judgment of the probate court admitting a lost or spoliated will.[8]

Sec. 980. Form of petition in error from justice.—Plaintiff in error says that in an action pending before C. B., one of the justices of the peace in and for the township of ———, ——— county, Ohio, wherein the plaintiff in error herein, J. S., was defendant and the defendant in error herein, P. W., was plaintiff, the said J. S., plaintiff in error, filed his motion to dismiss an attachment in said cause issued, supporting the same with the affidavit of the plaintiff in error, and that on the ——— day of———, 18—, on the trial of said motion, said attachment was by the consideration of said justice of the peace held and said motion was overruled, and that thereafter judgment was duly rendered against the said J. S., the plaintiff in error, all of which more fully appears by a copy of the record of the judgment and proceedings in the case duly certified, hereto attached, marked "A," and made a part of this petition.

The said plaintiff in error avers that there is error in the said record and proceedings, and that the court committed error in the trial of said action on said motion in this, to-wit:

[1] O. Code, sec 6708.

[2] Haff *v.* Fuller, 45 O. S. 494-7; Commissioners *v.* Jenkins, 19 O. S. 348; Fravert *v.* Finfrock, 43 O. S. 335. Two-mile assessment proceedings. Lewis *v.* Laylin, 46 O. S. 664.

[3] Seville *v.* Wagner, 46 O. S. 52; Baer *v.* Otto, 34 O. S. 11; Young *v.* Gerdes, 42 O. S. 102.

[4] Nan *v.* Gobrecht, 8 O. C. C. 518.

[5] Willinger *v.* Bramsche, 7 O. C. C. 208.

[6] Kelly *v.* Nichols, 10 O. S. 318.

[7] Bruder *v.* Biehl, 1 O. C. C. 85.

[8] Hollrah *v.* Lasance, 1 O. C. C. 187.

1st. That the court erred in holding said attachment and overruling said motion of the plaintiff in error to dismiss said attachment.

2d. That judgment was given by said justice upon said motion against the plaintiff in error when it ought to have been given for the plaintiff in error.

3d. That the judgment of the justice is against the law and the evidence.

The said J. S., plaintiff, therefore prays that the said judgment on said motion and attachment may be reversed and the said plaintiff in error may be restored to all things he has lost by reason thereof.[1]

Sec. 981. Error in the circuit court—Jurisdiction.—The circuit court has jurisdiction to reverse, vacate or modify any final order or judgment rendered by any court of common pleas, or *any judge thereof*, for errors appearing on the record.[2] Under the former statute, this court could not review an order made by a judge of the common pleas court at chambers,[3] but under the amended statute, the words, "or a judge thereof," were intended and do confer jurisdiction upon the circuit court to review a judgment rendered or an order made by a common pleas judge at chambers.

The statute authorizing the circuit court to review only judgments or final orders made by the court of common pleas, or judges thereof, it follows that it could not entertain proceedings in error in civil cases, direct from any court inferior to the common pleas. But it will be seen that it may entertain jurisdiction in error in criminal cases from courts inferior to the common pleas court.

The principles governing the prosecution of error are common to the prosecution of error in all of the courts, excepting as to the manner of the preparation and presentation of the causes, and some matters as to the bill of exceptions in cases going to the court of common pleas.

Sec. 982. Circuit court will consider the weight of the evidence.—The circuit court in reviewing cases on error is not relieved by statute, as is the supreme court, from considering any errors, and hence must consider and pass upon all of the errors which are assigned in the petition in error.[4] So, if one of the grounds of the motion for a new trial made in the *nisi prius* court was that the verdict of the court, or the finding of the court, was

[1] From Seville *v.* Wagner, 46 O. S. 52.
[2] Bates' Statutes, sec. 6709.
[3] Atwood *v.* Whipple, 48 O. S. 308.
[4] Bates' Rev. Stats., sec. 6709; Kramer *v.* R. R. Co., 53 O. S. 436.

not sustained by, or was against the weight of the evidence, and this is assigned as error, the circuit court, being required to pass on all the errors, is bound to consider it, and may, if it finds that the verdict or finding is manifestly against the weight of the evidence, reverse the judgment and award a new trial.[1] If this should be the only error found by the circuit court, the case must necessarily go back to the trial court, and cannot be taken to the supreme court because of the statute specially relieving that court from considering the weight of the evidence.

Sec. 983. Circuit court required to state the errors found when judgment reversed, or upon application of party excepting to a decision.—The statute requires the circuit court when it reverses a judgment and remands a case for a new trial or hearing, to state the errors found in the record upon which the judgment is founded.[2] So, also, is it provided that on application of any party excepting to a ruling or decision of the circuit court during trial, or on a motion for a new trial, such court shall find from the evidence, and state on the record the facts upon which the alleged error arises which may be material in determining whether error has intervened or not.[3]

It will be presumed that when the case reaches the supreme court, that the circuit court performed its duty, and has stated all the errors as the statute requires, and that the court found no errors which are not stated in its mandate.[4]

Sec. 984. Practice in the supreme court.—The author has observed that there is such a general lack of information as to the practice in the supreme court, and frequently it is—using a common expression—a bugbear. It is very simple. The real ground work or preparation for going to the supreme court is in the trial court. If the proper steps are taken there, then there is no difficulty in getting the case into and through the supreme court. New Trials, and Bills of Exceptions have been discussed under separate heads.

Some points of procedure and practice in the supreme court will be discussed, in a very plain, simple manner in their natural sequence.

Sec. 985. Jurisdiction of supreme court in error—Appellate jurisdiction.—The constitution of the State confers upon the supreme court "such appellate jurisdiction as may be provided by law."[5] And the legislature, in carrying out this provision of

[1] Patterson *v.* Inclined Plane Ry., 12 O. C. C. 274; s. c. 5 O. C. Dec. 665.

[2] Bates' R. S., sec. 6709.

[3] Bates' R. S., sec. 6710

[4] Wetzell *v.* Richcreek, 53 O. S. 62, 76.

[5] Art. IV., sec. 2.

the constitution, and in conferring jurisdiction other than original, designates it as jurisdiction in error, by providing that: "A judgment rendered or final order made, by any circuit court, or a judge thereof, court of common pleas, or a judge thereof, probate court, insolvency court, or the superior court, or a judge thereof, may be reversed, vacated or modified by the supreme court on petition in error, for errors appearing on the record, in any case in *quo warranto*, mandamus, *habeas corpus*, *procedendo*, or in which is involved the construction of the constitution of the United States or the State of Ohio, or the jurisdiction of any court of this State, or the construction or validity of a treaty or statute of, or authority exercised under the United States, or in which the decision is contrary to that of any circuit court, and not in accord with a previous decision in the supreme court, or in which is involved, exc usive of interest and costs, the sum or value of more than three hundred dollars."[1]

It will be noticed that this statute enumerates the cases in which the supreme court will assume jurisdiction.

First, it will review judgments or final orders in any of the extraordinary remedies. Second, cases involving the constitution either of the United States or of the State. Third, cases involving the jurisdiction of any court of the State. Fourth, the construction or validity of a treaty or statute of, or authority exercised under the United States. Fifth, cases where there is a conflict of decision between circuit courts, and not in accord with a previous decision in the supreme court. And sixth, cases in which is involved, exclusive of interest and costs, the sum or value of more than three hundred dollars. Cases involving less than three hundred dollars cannot be reviewed by the supreme court unless they come within some of the exceptions named in the statute, as involving constitutional or jurisdictional questions, etc.

The jurisdiction being confined to the reviewal of a judgment or final orders, these two matters will be treated in a separate section.

Sec. 986. Same, continued—Limitation in amount.—The jurisdiction of the supreme court to review a judgment or final order made by any circuit court, or a judge thereof, court of common pleas, or a judge thereof, and the other courts named in the statute (excepting in the cases specially exempted from this limitation—which are: in any *quo warranto*, mandamus, *habeas corpus*, *procedendo*, or in which the construction of the constitution of the United States or of Ohio, or the construction or

[1] Bates' R. S., sec. 6710.

validity of a treaty or statute of, or authority exercised under the United States, or in which the decision is contrary to that of any circuit court, and not in accord with the previous decision of the supreme court), is now limited to cases in which is involved, exclusive of interests and costs, the sum or value of more than three hundred dollars.[1]

The effect of the judgment complained of must be considered in determining the amount involved. Where a plaintiff in the court of common pleas claims more than three hundred dollars, but recovers less, and is content with the judgment, the supreme court has no jurisdiction in a proceeding in error prosecuted in that court by the defendant below, for the amount involved as to him is less than three hundred dollars. Where, however, the plaintiff claims more than three hundred dollars, but recovers less, and prosecutes error to the circuit court, where the judgment is reversed and the cause remanded for a new trial, in such cases, as to the defendant, the judgment of reversal involves the full amount of the plaintiff's claim, and he may prosecute error to the supreme court for the reversal of the judgment of the circuit court.[2]

Sec. 987. Limitation in error in all courts.—The time within which proceedings in error must be brought is within four months after the rendition of the judgment or final order complained of.[3] That a case be properly brought within this provision all of the requirements essential to a commencement of a proceeding in error must be complied with.

Sec. 988. Same limitation applies to cross-petition in error.—A cross-petition in error filed by a defendant in error to reverse the judgment for errors prejudicial to him, which are not assigned in the petition in error, must be filed within the same period as the petition in error.[4]

Sec. 989. Where there are two or more parties the statute runs against all.—The statutes relating to proceedings in error are strictly construed, and, therefore, where a judgment for or against two or more parties is sought to be reversed, it must be commenced against all of them within the limitation prescribed in order to confer jurisdiction upon the court to reverse or modify such judgment or any part of it as to either of such parties.[5]

[1] Bates' R. S., sec. 6710.
[2] Draper *v.* Clark, 59 O. S. 336.
[3] Code, sec. 6723.
[4] Wade *v.* Kimberly, 5 O. C. C. 33; Mannix *v.* Purcell, 46 O. S. 151.
[5] Burke *v.* Taylor, 45 O. S. 444. Smetters *v.* Rainey, 14 O. S. 287; Jones *v.* Marsh, 30 O. S 20.

Sec. 990. Where parties are under disability, statute runs from removal.—In case the person entitled to commence proceedings in error is under a disability, such as being an infant, or other disability, such person is entitled to bring the same within four months from the rendition of the judgment or final order exclusive of the time of such disability.[1] While the statute of limitation under consideration includes married women among those who may be under disability, that disability as to such persons is now removed by statute.[2]

Where by the saving clause of the statute of lim tations, the right to a proceeding in error is saved to one of the parties against whom it is rendered, it inures to the benefit of all.[3] When the statute has commenced to run against a party against whom a judgment has been rendered, who dies subsequent to the rendition thereof, his heirs, being under disability at the time of his death, which is not removed until after the expiration of the limitation against the ancestor, cannot prosecute proceedings in error; for it is the universal rule that where time begins to run against the ancestor, it continues to run against the heir, although the latter is under disability.[4]

Sec. 991. Same, continued—The statute begins to run when.—It is from the "rendition of the judgment or the making of the final order," that the statute runs. The right, or cause of a proceeding in error, accrues at the time of the rendition of the judgment, or making of the final order. In cases where a motion for a new trial is necessary to lay the foundation for proceedings in error, the entry of the final judgment is usually delayed until the motion is passed upon by the court, and final judgment entered up to that time, and of course the statute runs from that time. The statute, however, does authorize the clerk to enter judgment when a general verdict is returned by a jury, unless the court order the case to be reserved for future argument or consideration, and a judgment entered in pursuance of this authority before the expiration of the statutory time for filing a motion for a new trial, is nevertheless regular and valid, and the limitation runs from the entry of such judgment and not from the time when the motion for a new trial is overruled. If either party wishes to have the entry of judgment delayed to await the result of a motion for a new trial, he should, when the verdict is returned, make his desire known to the court. It is

[1] R. S., sec. 6723; amended 93 O. L. 394.

[2] 84 O. L. 132.

[3] Buckingham *v.* Bank, 21 O. S. 131; Wilkins *v.* Phillips, 3 O. 49.

[4] Williams *v.* Presbyterian Society, 1 O. S. 478; Bartlow *v.* Kinnard, 38 O. S. 373.

well settled that the overruling of a motion for a new trial is not a final order from which error will lie; hence the necessity of having the entry of judgment delayed until action is taken upon the motion.[1] It makes no difference even if the reason for the delay in passing on the motion for a new trial is that the trial judge is a non-resident of the county and absent therefrom.[2] Where a demurrer to an answer is sustained, but no judgment is rendered or order made which is definitive in its character until a subsequent term, the time within which a proceeding in error may be commenced by the defendant will be computed from the date of the final judgment or order.[3]

Sec. 992. Omitted parties may be brought in after expiration of limitation.—Where a party to a proceeding in error is by mistake omitted in a petition in error filed by his co-tenants, on behalf of all to reverse the judgment, the court may allow such omitted person to be made a party, though the time has elapsed for filing the petition in error.[4] Johnson, C. J., in laying down this doctrine observed that if the court of error could not allow such a mistake to be corrected in furtherance of justice, our reformed system of pleading in respect to its supposed superiority over the old system is a delusion. The case of *Smetters v. Rainey*[5] was distinguished, it adopting the doctrine that if all the parties to a joint judgment being necessary parties to a petition filed by one of the defendants to reverse it, are not made parties until after the limitation is expired, the revising court has no jurisdiction to reverse or modify any part of the judgment.

Sec. 993. All the papers must be filed within the limitation.—The right to institute and carry on proceedings in error, is strictly statutory, and co mpliance therewith is essential to clothe the reviewing court with jurisdiction.

The statute prescribes what papers shall be filed with the petition in error.[6] The two sections, the one relating to the limitation of error proce edings, and the one providing what papers shall be filed, as well as the one relating to service of summons, are to be construed together. All the papers which are necessary to be filed with the petition in error, in order to take the case up on error, must be filed within the statutory period of limitation, otherwise the case is not properly com-

[1] Youn *v.* Shellenberger, 53 O. S. 291; Dowty *v.* Pepple, 58 O. S. 395; Conord *v.* Runnels, 23 O. S. 601. The statute begins to run from the day on which the judgment is actually rendered. West *v.* Maddock, 16 O. S. 418.

[2] Dowty *v.* Pepple, 58 O. S. 395.

[3] Lafferty *v.* Shinn, 38 O. S. 46.

[4] Secor *v.* Witter, 39 O. S. 218. But see Erwin *v.* Mathers, 18 C. C. 199.

[5] 14 O. S. 287.

[6] Sec. 6716.

menced. For example, if all of the assignments in the petition in error are founded upon a bill of exceptions taken in a lower court, such bill must be filed in the reviewing court, within the four months, to give the court jurisdiction; it will not be sufficient to merely file a printed record embodying the bill of exceptions, and not file the original bill.[1]

The mere filing of a petition in error, without the other papers required by the statute, viz.: the transcript of the complete record, or the original papers and transcript of journal and docket entries, is not a sufficient compliance with the statute. If any one of these essentials are not complied with, and the transcript or original papers are not filed within the four months' limitation, the petition in error may be dismissed. Such papers cannot be filed after the limitation has expired; the plaintiff in error has then lost his right to review the judgment.[2]

If the petition in error alleges certain matters of error which are founded upon a bill of exceptions, the latter of which is not filed within the proper statutory time, may be stricken from the files; and if the entire proceeding is based upon such bill the same must fall, but if there are other grounds of error not founded on such bill, the same may be heard.[3]

Sec. 994. What is to be filed in supreme court.—Only causes in error going to the supreme court, it is only such papers that are necessary to take a case up on error that are filed, and these are precisely the same as are filed in the circuit court. The statute points out the mode of procedure to obtain a reversal of a judgment by a petition in error setting forth the errors complained of.[4] Its contents will be considered later.[5]

With that petition in error must be filed either a transcript of the final record or a transcript of the docket or journal entries, with such original papers or transcripts thereof as are necessary to exhibit the error complained of.[6] Usually, and the most convenient way is to file merely a transcript of the docket and journal entries, and the original papers themselves, and not a transcript of the final record. Provision is made for withdrawal of the papers for the purpose of making the final record.[7] Occasionally a clerk may be found who will insist on retaining the original papers and in making a complete transcript of the same, but he has no right to do so, as the statute seems to leave it optional with the party prosecuting error as to which course he shall pursue.

[1] Townsend *v.* Harrison, 58 O. S. 398.
[2] Bank *v.* Moderwell, 59 O. S. 221.
[3] Godfrey *v.* Exton, 18 O. C. C. 315.
[4] R. S., sec. 6713.
[5] See sec. 998, *post.*
[6] Code, sec. 6716.
[7] R. S. 6716.

Sec. 995. No pleadings in error necessary.—There are no pleadings to be filed in a proceeding in error, excepting the petition in error, and a cross-petition in error.[1] A demurrer to a petition in error is improper, as the same is heard upon the record.[2]

Sec. 996. Authentication of transcript.—A transcript either of the complete record or of journal entries filed with a petition in error, should be properly authenticated by the clerk. This is not because of any express statutory declaration to that effect. There is a provision making it the duty of the clerk to furnish to any one interested an authenticated transcript.[3] It is the clear duty of the clerk to certify that a transcript is full and complete, and if this be not done under the broad power of amendment, the plaintiff in error may be permitted to take the same temporarily from the files and having it amended; and this may be done after the expiration of the period of limitation within which the proceeding in error must be commenced.[4]

Sec. 997. Parties in error.—Who shall be parties to proceedings in error depends much upon the same principles as to who shall be made parties to an action in the first instance. This depends upon the nature of the obligation or right sought to be enforced in the suit, and upon the provisions of the code with reference to parties. The reviewing courts have, in some instances, at least, applied the rules applicable to the prosecution of original actions to proceedings in error. For example, if no objection be taken on account of defect of parties, the same will be deemed to have been waived.[5] Our supreme court have said that while good practice may require that all the parties to a judgment sought to be reversed on error ought to be made parties thereto if their interests might be affected by any judgment which the reviewing court may pronounce, yet it is not in all cases necessary to give the court jurisdiction over the subject-matter of the proceeding, that all parties below should be made parties in error.[6] But this is an unsatisfactory and indefinite expression, and can hardly serve any useful purpose as a guide, although the facts of the case may be looked to for guidance.

It would seem that whether or not there are proper parties before the reviewing court would depend, as already stated, upon the law of parties to original actions, and upon the conse-

[1] Niven *v.* Smith, 2 W. L. M. 465.
[2] Ross *v.* Tailoring Co., 7 O. C. C. 465; s. c. 3 O. Dec. (Circ.) 658.
[3] R. S., sec. 6717.
[4] Bank *v.* Moderwell, 59 O. S. 221.
[5] Cairnes *v.* Knight, 17 O. S. 69.
[6] Wangerien *v.* Aspell, 47 O. S. 250.

quent judgment rendered therein. If the interests of the parties interested in the cause on the one side or the other are several, separate and distinct as to each party; if the judgment affects one party one way, and another a different way, then it would seem that such parties would have the absolute right to prosecute error in their own right so far as the judgment affects them, but making all of the parties to the action below parties in error. And if the proceeding in error will in any manner affect or injure any of the remaining parties not prosecuting error, whether on the same side or on different sides, they should follow up their interests in the reviewing court. They may join in the proceedings in error; or if the plaintiff in error has not assigned all of the errors, or those errors which affect other parties, then such other parties may file a cross-petition in error assigning therein all such errors as affect them individually, and not assigned in the petition in error.

One or more of several cross-petitioners, defendants in the action below, who may desire to prosecute error, or assign error, independently of the plaintiff below, should file a cross-petition in error in the same case which the plaintiff below has filed. There should not be more than one proceeding in error to consider all of the alleged errors affecting all of the parties to an action. If any such parties should file separate, independent petitions in error, with separate numbers, they should upon motion in the reviewing court, by analogy to the consolidation of original actions, be consolidated into one proceeding in error.

The above is believed to be a correct rule of procedure so far as concerns judgments which are several, and it will not be necessary to consider in this connection, what judgments may be severable.

As to judgments which are joint, it has been held that all of the defendants are necessary parties to a petition filed by one of their number to reverse it, and may be made so, as plaintiffs or defendants. And that if they are not all so made parties within the time limited for the prosecution of error, that the revising court has no jurisdiction.[1] And where parties are united in interest, the judgment being a unit, service upon one prevents the running of the statute against all.[2]

But the rules just stated have been modified by a later decision, so that a party to a joint judgment who has been omitted, may be brought in, or become a co-plaintiff in error after the limitation in error has expired.[3] The rule as to joint judgments, furthermore, cannot be of universal application, as the code relating to original actions, allows judgments to be taken

[1] Smetters *v.* Rainey, 14 O. S. 287; Jones *v.* Marsh, 3 O. S. 20.

[2] Buckingham *v.* Bank, 21 O. S. 131.

[3] Secor *v.* Witter, 39 O. S. 218.

upon a joint judgment against defendants who have been served when others have not been served.[1] Consequently proceedings in error could be prosecuted by one of such defendants without the presence of the one who was not served. Separate judgments against separate parties on separate causes though rendered in favor of same party give rise to separate rights to prosecute error (Chapman Mfg. Co. *v.* Taylor, 61 O. S. 394).

Where an action against two defendants, one of whom is in default for answer, is tried on the claims of the plaintiff, and the other defendant is not in default, the one in default is not then a necessary party to, and need not be joined in error proceedings.[2] In a proceeding in error to reverse a judgment rendered against the plaintiff in favor of two defendants in an action on a joint and several obligation, where the same was allowed to stand undisposed of as to a third defendant, the latter is not a necessary party.[3] Where some of the defendants to a joint judgment are not served, but afterwards release all errors in the proceeding, those who were not served cannot have the judgment reversed for such error or irregularity.[4]

In general, a proceeding in error must be prosecuted by a party to the record and to the judgment sought to be reversed; but if such party die before error is prosecuted, his administrator or executor, or heir, according to the nature of the subject-matter of the judgment, who becomes privy thereto by operation of law, may commence and prosecute error without first being made a party to the judgment by revivor or otherwise;[5] and where the heirs or legal representatives seek to institute such proceedings, they must do so in their own names, and not in the name of the deceased party.[6] In such cases, the facts upon which the law operates in creating the privity must be averred in the petition in error, and are issuable and must be verified.[7] The want of proper parties in a lower reviewing court, not having been there objected to, will be considered as waived in the supreme court, and cannot therefore be assigned for error. Such was the rule established by the code in civil actions proper, and by analogy it is applicable to error proceedings.[8]

Objections to the joinder of parties should be made in the reviewing court before the cause is prepared and ready to be submitted on its merits.[9]

Sec. 998. The petition in error.—The proceedings to obtain a reversal, vacation, or modification of a judgment or order, is

[1] Code, sec. 5051. See sec. 811, *ante*, where this matter is specially discussed.

[2] Toledo *v.* Schulters, 11 O. C. C. 528; s. c. 5 Oh. Dec. 269.

[3] King *v.* Bell, 36 O. S. 460.

[4] Ash *v.* McCabe, 21 O. S. 181.

[5] Hammond *v.* Hammond, 21 O. S. 620; Hanover *v.* Sperry, 35 O. S. 244.

[6] Kennard *v.* Kennard, 35 O. S. 660.

[7] Hanover *v.* Sperry, 35 O. S. 244.

[8] Cairnes *v.* Knight, 17 O. S. 68.

[9] Wangerien *v.* Aspell, 47 O. S. 250.

by petition in error, filed in the reviewing court, setting forth the errors complained of.

The petition in error contains the assignment of errors complained of, and these must be shown by the record properly excepted to when necessary. Errors not specifically assigned will not be noticed, unless substantial justice requires it to be done.[1] An error not included in the motion for a new trial, n r assigned in the circuit court, will not be considered by the supreme court, unless for some special or peculiar reasons, affirmatively appearing upon the record,[2] such as affects the jurisdiction of the court.[3] Nor will the supreme court consider any errors that may be apparent on the record which were not raised in the trial court in the first instance, nor assigned in the circuit court.[4] And where there is no assignment of errors, or no specific assignment of errors, the judgment will be affirmed,[5] as the presumption in such case is that they have been waived.[6] An assignment that the judgment was rendered for the wrong party strictly raises the question whether the proper judgment has been rendered on the pleadings and facts.[7]

Under the amended statute relating to the jurisdiction of the supreme court, where the ground of jurisdiction is that "the decision is contrary to that of any circuit court, and not in accord with the previous decision of the supreme court," the fact of a contrary decision not appearing in the record should be alleged in the petition in error with such definiteness as to advise court and counsel of the conflict of decision upon which the plaintiff in error relies.[8]

Sec. 999. Answer in error.—A defendant in error may be permitted to file an answer to a petition in error, for the purpose of setting up any facts constituting a defense to the proceeding which have occurred subsequent to the rendition of the judgment or order complained of by the plaintiff in error. It is proper practice to allow a defendant in error to allege facts showing that the plaintiff in error has waived the error of which he complains.[9] A settlement of the case may be shown by an answer in error;[10] and it may likewise be shown in the supreme court that, after a cause has been remanded to the trial court by the

[1] Booth *v.* Hubbard, 8 O. S. 244.

[2] Hills *v.* Ludwig, 46 O. S. 373; Levi *v.* Daniels, 22 O. S. 514.

[3] Levi *v.* Daniels, 22 O. S. 38; Pollock *v.* Cohen, 32 O. S. 514.

[4] Railway Co. *v.* Construction Co., 49 O. S. 681; Pollock *v.* Cohen, 32 O. S. 514.

[5] Wells *v.* Martin, 1 O. S. 386.

[6] Pollock *v.* Cohen, 32 O. S. 514; Youngstown *v.* Moore, 30 O. S. 133.

[7] Insurance Co. *v.* McGookey, 33 O. S. 555.

[8] Sheaff *v.* Williams, 59 O. S. 559.

[9] Saxton *v.* Plymire, 3 O. C. C. 209; s. c. 2 Oh. Dec. 118 (Circ.).

[10] Matthews *v.* Davis, 39 O. S. 54.

circuit court, the parties voluntarily appeared in the trial court without objection or suggestion by the plaintiff that he intended to prosecute error to the reversal of the circuit court. This should be brought to the attention of the supreme court by answer, and not by a motion for diminution of the record.[1]

Sec. 1000. Cross-petition in error.—A defendant in error may file a cross-petition in error for the reversal of errors prejudicial to him and not assigned in the petition of the plaintiff in error.[2] It must be filed within the same time as the petition in error,[3] and may be filed without leave of court.[4] It is not necessary that a summons in error issue upon such cross-petition.[5]

Sec. 1001. What petition in error may be filed in supreme court without leave.—Petitions in error to review a judgment or final order of the circuit court, or a judge thereof, or of the general term of the superior court of Cincinnati, may be filed without leave of the supreme court or a judge thereof.[6]

Sec. 1002. Application to supreme court to review judgment of court inferior to circuit court.—No petition in error to review the judgment or final order made by a court of common pleas, or a judge thereof, probate court, insolvency court, or the superior court (other than general term) or a judge thereof, can be filed in the supreme court without leave.[7]

The supreme court has power to grant leave to file a petition in error for the reviewal of the judgment of the courts inferior to the circuit court, named in the statute, but it will seldom, if ever, be exercised, because of the continuous crowded condition of its dockets. Cases might arise, however, where the circumstances would seem to demand the exercise of this power, but unless there are special reasons the court may very properly refuse leave.[8] For instance, where the circuit court will not be in session for such a period of time, that it may cause serious invasion of the rights of parties by delay, the supreme court should take cognizance of and promptly correct errors.[9] This cannot be done except upon motion for leave and a proper showing. In ordinary cases the rights of parties may be protected by a stay of execution of the judgment or order.

[1] Collins *v.* Davis, 32 O. S. 76.
[2] Bundy *v.* Iron Co., 35 O. S. 80; Shinkle *v.* Bank, 22 O. S. 516.
[3] Mannix *v.* Purcell, 46 O. S. 102; Wade *v.* Kimberly, 5 O. C. C. 33; s. c. 3 Cir. Dec. 18.
[4] Bundy *v.* Iron Co., *supra.*
[5] Brown *v.* Kuhn, 40 O. S. 468.
[6] Bates' Rev. Sts., sec. 6710.
[7] R. S., sec. 6710.
[8] Benham *v.* Conklin, 3 O. S. 509.
[9] Railroad Co. *v.* Sloan, 31 O. S. 1.

Sec. 1003. Motion for leave to file petition in error—Requirements.—The ordinary rules applicable to motions filed in the supreme court, govern motions for leave to file petitions in error. Notice in writing of the intended application, briefly specifying the errors relied upon, should be given to the adverse party or his attorney, at least ten days when made to the court and five days when made to a judge, before the application shall be acted on, unless in view of special circumstances attending the case, the court or judge should determine that justice required the time of such notice to be abbreviated or dispensed with.[1] A copy of the notice with proof of service shall accompany the application. The same cannot be placed on the docket until the proof of service of notice is filed.

A motion for leave to file a petition in error will not be considered, unless counsel for the applicant file with the papers in the case either a printed or plainly written brief, containing a statement of the questions presented, and a short statement of so much of the case as may be necessary to show how the questions arise.[2]

Sec. 1004. Summons in error.—Upon the filing of a petition in error a summons shall issue and be served, or publication made, as in the commencement of an action.[3] The summons is issued by the clerk in which the petition in error is filed, upon the written precipe of the plaintiff in error, or his attorney. It is issued to the sheriff of the county in which the defendant in error or his attorney of record is found.[4] The summons contains a statement that a petition in error to reverse the particular judgment has been filed,[5] and of the names of the parties.[6] Summons in error need not be issued upon the filing of a cross-petition in error.[7]

Sec. 1005. Return day of summons—Rule days.—If summons is issued in vacation, it is returnable on or before the first day of the term of court; if issued in term time, it is returnable on a day therein named.[8] If the last publication or service of summons be made ten days before the end of term, the case shall stand for hearing at that term.[9]

Sec. 1006. Judgment may be rendered without service.—The supreme court, on the hearing of a motion for leave to file a

[1] Rule of Practice, 8.
[2] Rule of Practice, 8.
[3] R. S., sec. 6713.
[4] R. S., sec. 6714.
[5] Sec. 6713.
[6] Bechtold *v.* Fisher, 12 O. C. C. 559; 5 Oh. Dec. 685.
[7] Brown *v.* Kuhn, 40 O. S. 468.
[8] Sec. 6713.
[9] *Id.*

petition in error, whereof ten days' personal notice has been given to the adverse party, or his attorney, may, in its discretion, at the time of granting such leave, enter a judgment without the issue or service of a summons in error.[1]

Sec. 1007. Service of summons.—Service of summons in error is made as in original cases except that it may be made upon the attorney of record instead of the party.[2] Where summons is directed to only one defendant, where there are several, service if made on the attorney of record in such case will be good as to the party named therein.[3]

Sec. 1008. Waiver of summons.—A summons need not issue when the defendant in error waive the issue and service thereof.[4] It is common practice to endorse such waiver upon the petition in error, but this does not take effect until the petition is filed, so that if the party die before the same is filed, it is of no effect.[5] A party who appears and submits a case on error upon oral argument or printed brief waives the issue and service of summons.[6]

Sec. 1009. Commencement of proceeding in error—Within the time limited.—A proceeding to reverse a judgment is as truly adversary in its character as an original action; it constitutes a distinct suit between the parties, resulting in a judgment. It must be commenced within the period prescribed by the statute. The direct requirement of the statute is that the same should be commenced by petition filed in the court of error, and that summons be thereupon issued and served, or publication made as in the commencement of an action.[7] There is no statute relating to a proceeding in error as there is to an original action, which prescribes when the same will be deemed commenced, so that the court applies, by analogy, the statute with respect to an original action, to a proceeding in error. That is, a proceeding in error is deemed commenced, as of the date of the summons.[8]

Consequently, where a petition in error is filed and summons in error is issued, and served before the return day, the proceeding is properly commenced, although service of the writ is not made until after the expiration of the statutory period of

[1] R. S., sec. 6713.
[2] R. S., sec. 6713.
[3] Buckingham *v.* Bank, 21 O. S. 131.
[4] R. S., sec. 6715.
[5] McGuire *v.* Ranney, 49 O. S. 372.
[6] King *v.* Penn, 43 O. S. 57.
[7] R. S., sec. 6723.
[8] Ross *v.* Willet, 54 O. S. 150; Robinson *v.* Orr, 16 O. S. 284; Code, sec. 4988; Bowen *v.* Bowen, 30 O. S. 312; Moore *v.* Chittenden, 39 O. S. 563.

limitation. The service when so made relates back to the date of the summons and completes as of that date the commencement of the proceeding.[1] If the summons is not issued within the period of limitation, then the action is not properly commenced.[2]

Applying the other provisions of the code as to civil actions to proceedings in error, an attempt to commence a proceeding in error is equivalent to the commencement thereof when the party diligently endeavors to procure service, and service is actually made within sixty days.[3] So an attempt to commence a proceeding in error by filing a petition in error and other papers, and causing summons to be issued and served which proves ineffectual and is set aside, is equivalent to the commencement of the proceeding, if followed by valid service within sixty days.[4] The mere filing of a petition in error, without causing a summons to be issued, is not an attempt to commence a proceeding in error. To constitute an attempt and a diligent endeavor to procure service so as to bring one within the saving provisions of the code, a summons must be caused to be issued before the expiration of the statute of limitations governing the action, has expired.[5]

Sec. 1010. Final order defined.—Judgments and final orders only, being reviewable, it is necessary to know the distinction between them, and what a final order is. There is, according to the definition furnished by the code, a marked distinction between a judgment and a final order.

A judgment is the final determination of the rights of the parties in action ; and a direction of a court or judge, made or entered in writing, and not included in a judgment, is an order.[6]

"An order affecting a substantial right in an action, when such order in effect determines the action and *prevents a judgment*, and an order affecting a substantial right made in a special proceeding or upon a summary application in an action after judgment, is a final order."[7]

The two elements which must be present to bring a final order within the rule of the statute so as to be reviewable, are : that it must prevent a judgment, or it must affect a substantial right.

A decree or judgment which disposes of the whole merits, either of the whole case or some branch of it, putting an end

[1] McDonald *v.* Ketchum, 53 O.S. 519.

[2] B. & O. R. R. Co *v.* Ambach, 55 O. S. 553.

[3] Code, sec. 4988; Kinkead's Pldg., sec. 7.

[4] Ross *v.* Willett, 54 O. S. 150.

[5] B. & O. R. R. Co. *v.* Ambach, 55 O. S. 553.

[6] R S., sec. 5310.

[7] R. S., sec. 6707.

thereto, is final.[1] But an order or judgment which leaves a material question for further action or determination is an interlocutory one.[2]

In determining what is a final order, the substance and effect must be considered and not its legal or equitable nature.[3]

Illustrations of what have been held to be final orders may be found in the author's work on Pleading,[4] and the same will not be repeated here.

Sec. 1011. Final order, continued—"Substantial right" defined.—A substantial right, as contemplated by the statute, means of course a right which one has under the law, one which the law will recognize, protect and enforce.[5] The substantial right must be affected by a determination of the action, or in a special proceeding.

For instance, setting aside a judgment rendered on defautl on motion at a subsequent term, is an order affecting a substantial right;[6] so is an order striking an answer of a defendant from the files.[7]

Sec. 1012. Error in contempt proceedings.—A proceeding brought either under our statutes authorizing punishment for contempt, or in pursuance of the inherent power which courts have in this behalf, may be reviewed on error, upon the question whether or not the court, in awarding punishment, has exercised a reasonable discretion, in awarding punishment, and if it be considered by the reviewing court that the lower court has abused its discretion, the judgment may be reversed.[8]

Sec. 1013. Reviewal of order or judgment overruling demurrer.—In considering the question as to whether or not the action of the trial court will be reviewed where the demurrant has filed an answer or reply after such overruling of a demurrer, our courts have held that even though it be satisfied that the trial court erroneously overruled the demurrer, and the defendant answers, that it will not reverse the judgment where it appears upon a consideration of the whole record, that the error in overruling the demurrer was not a prejudicial error.[9] Of course the order to be reviewable at all must be either a final one, or one which affects a substantial right.

[1] Kelly *v.* Stanbery, 13 O. 421.

[2] Teaff *v.* Hewitt, 1 O. S. 511; Evans *v.* Dunn, 26 O. S. 444.

[3] Railroad Co. *v.* Sloan, 31 O. S. 1.

[4] Sec. 1236.

[5] Armstrong *v.* Brewing Co., 53 O. S. 467.

[6] Braden *v.* Hoffman, 46 O. S. 639.

[7] Henry *v.* James, 48 O. S. 443.

[8] Myers *v.* State, 46 O. S. 473; Post *v.* State, 14 O. C. C. 111; State *v.* Davis, 18 O. C. C. 479.

[9] Yocum *v.* Allen, 58 O. S. 280; Newberger *v.* Finney, 17 O. C. C. 215.

It is perfectly clear that an order overruling a demurrer granting the demurrant leave to plead is not a final order.[1] To review the order of the court in such case, the party should submit to a final judgment.

It may be sound reasoning, following the liberal spirit of the code, to say that when a demurrer has been erroneously overruled, that the party demurring ought not be put to the hazard of standing on the demurrer and permitting judgment to be entered against him, but that he should be permitted to plead and still preserve his rights upon the demurrer, so that he can insist upon the error in the revising court. It is evident that he cannot upon the ground that it is a final order, but is it not possible that he can insist upon the error upon the theory that a "substantial right" has been violated? But to allow him to claim this, he must have been prejudiced in his rights to such an extent as will warrant the court in recognizing and protecting such right.

The real question upon a proposition like this, is whether or not a defendant, for example, must stand or fall upon his demurrer to the petition whether he waives the error of the court in erroneously overruling the demurrer, by taking leave and pleading. In an Ohio case before the code it was held that a plaintiff who after his demurrer to a plea in bar has been overruled, takes issue thereon, waives the error.[2] And it is variously stated by text-writers and courts that if a party plead after his demurrer is overruled, the demurrer is waived, and the ruling thereon cannot be assigned for error.[3] By failing to take advantage of the grounds of demurrer, excepting that the court has not jurisdiction of the subject-matter, and that there are not sufficient facts stated to constitute a cause of action, they are all waived. So that it is perfectly clear that if a court wrongfully overrules a demurrer upon either of these two grounds, the demurrant can assign the same as ground of error notwithstanding he may have answered, and the cause have been tried upon his answer. But how is it as to the other grounds of demurrer? It is true that all formal defects are waived by pleading to the merits, and a party may waive all of the grounds but the two above named by pleading to the merits. But if he has filed a demurrer for any of the grounds other than that the court has no jurisdiction, or that there are not sufficient

[1] Krause *v.* Stichtenoth, 15 O. C. C. 199.

[2] Mitchell *v.* McCabe, 10 Ohio, 406.

[3] 1 Gould's Pldg., 474, sec. 31; Ambler *v.* Whipple, 32 Am. St. Rep. 202; 139 Ill. 311. The overruling of a demurrer cannot be reversable where the defenses set up are substantially availed under the plea. Alabama, &c., Ry. *v.* Brooks, 30 Am. St. Rep. 528. See Phillips' Pldg., secs. 304, 305; Bliss' Pldg., sec. 417; Fisher *v.* Scholte, 30 Ia. 221; Tennant *v.* Pfister, 45 Cal 270.

facts stated to constitute a cause of action, can it be said that he has had a "substantial right" injured which is prejudicial error, by the overruling of such demurrer, even though he has answered, and has not been able to avail himself of the ground of demurrer upon answer? Does he waive that substantial right by answering? It would not do any good to incorporate the ground of demurrer in his answer, which he may do, as he has already had the ruling of the court thereon. It would seem as though it would be possible for a party to have a substantial right violated by the wrongful overruling of a demurrer, even though an answer had been filed, and that the error would not be waived.

Sec. 1014. Error in sustaining a demurrer.—Substantially the same questions of waiver are involved when the court wrongfully sustains a demurrer and the party takes leave and amends. In such case the order in sustaining the demurrer granting leave to plead is not a final order; final judgment must be entered to render it reviewable on that ground. But whether a substantial right has been violated by being compelled to amend and omit some part of the allegations, or whether or not the party waives the error by amending his pleading depends upon the same principles exactly as were discussed in the previous section.[1]

If the demurrer went to the jurisdiction or to the want of facts, final judgment must necessarily be entered at once, and the case must then go up on error, unless the party amends and states other additional facts to bolster up or to state a cause of action. If in so doing he is compelled to omit any facts, then it is a question whether he is injured. If the demurrer is sustained upon other grounds and the party amends and loses the ground of demurrer then it is a question as to whether he has lost a substantial right which must depend upon the circumstances.

It has been held, however, that it is only when the allegations of a proper paragraph of pleading may be established under other paragraphs that the sustaining of a demurrer to the paragraph in question is harmless.[2]

Sec. 1015. To what extent a court of error will consider or look into the facts.—A reviewing court cannot determine whether or not there is error in the record, without first ascertaining the facts. The facts are disclosed by the bill of exceptions when the trial was had to a jury. When the cause was tried to the court

[6] See Bliss' Pldg., sec. 417.

[7] Barnard *v.* Sherley, 135 Ind. 547; s. c. 41 Am. St. Rep. 454.

without a jury, the facts may be found by the court, and incorporated in the entry.[1] If the parties are satisfied with the finding by the court, and do not assign error thereon on the ground that it is not sustained, or is against the evidence, then the reviewing court will look to the finding. But if it be claimed that such finding is not sustained, or is against the weight of the evidence, then the circuit court will look to the bill of exceptions, as it likewise does when it is claimed that a verdict of the jury is against the weight of the evidence. If the facts found by the trial court do not embrace all of the material facts disclosed by the uncontradicted evidence furnished by the bill of exceptions, the circuit court will look to all the facts, the facts found and any additional ones in the bill of exceptions.[2]

All reviewing courts will consider the facts for the purpose of ascertaining whether there are any facts to support the conclusions of law.

Sec. 1016. Amendments allowed in proceeding in error.—Amendments which pertain to some clerical error which in no way affects the status of the case as to the merits of the plaintiff's case or defendant's case, may be made in a proceeding in error as in an original case. But an amendment that pertains to any matter that is material to either party, either to the making of the case or to the defending of it, cannot be made.[3] Such matters as are capable of amendment may be made after the period of limitation has expired as well as before.[4]

Sec. 1017. Parties cannot confer jurisdiction.—Parties cannot by private agreement or consent, or by voluntary appearance, confer upon the court power to hear and determine a cause after the time has expired within which the same should have been commenced.[5] A case will, therefore, upon motion, be stricken from the docket if appearance has not been entered by, or summons served on, a defendant is error, within the proper time, even where the petition has been placed on the docket upon a motion for leave to file; unless plaintiff, by amendment allege facts upon which issue may be joined, showing that he is within the saving clause of the statute.[6]

Sec. 1018. Trial under belief that proceeding was properly commenced.—Where a petition in error has been filed within the period of limitation and both parties have proceeded with the

[1] *Ante*, sec. 292.

[2] Sturgeon *v.* Hull, 8 O. C. C. 260; s. c. 4 O. C. Dec. 457.

[3] Godfrey *v.* Exton, 18 O. C. C. 315.

[4] Bank *v.* Moderwell, 59 O. S. 221.

[5] King *v* Penn, 43 O. S. 57.

[6] Bowen *v.* Bowen, 36 O. S. 312; R S., sec. 6723.

preparation of the case for final hearing in the belief that the proceeding had been duly commenced and was actually pending, the defendant in error is estopped, after appearing and submitting the case, either upon oral argument or printed briefs, to question the jurisdiction of the court either of the parties or subject-matter, upon the ground that no summons in error was issued or served.[1] Any other rule of practice would enable the parties to trifle with the court by first requiring it to hear the case upon its merits, and then deny its jurisdiction.[2]

Sec. 1019. Error must be apparent on the record.—It is a settled principle of practice in all reviewing courts that the error complained of, and for which a judgment or final order may be reversed, must *affirmatively* appear on the face of the record.[3] And the statute reads that a judgment may be reversed on petition in error, "for error appearing on the record."[4] If some complaint be made as to the action of a trial judge during the course of a trial, the record must show what such did or did not do. Merely making objection and taking an exception to what are claimed to be improper remarks of counsel, is not sufficient without showing what action the court took.[5]

Sec. 1020. Order of docketing and hearing cases in supreme court.—All cases brought in or taken to the court must be entered on the docket in the order in which they are commenced, received or filed, and they must be taken up and disposed of in the same order, except that the court may take up and dispose of the following classes of cases in advance of their order on the docket: (1) Cases where the persons seeking relief have been convicted of felony; (2) cases involving the validity of any tax levied or assessment made, or the power to make such levy or assessment; (3) cases involving the construction or constitutionality of any statute; (4) or any question of practice where the questions arising are of general public interest; (5) and proceedings in *quo warranto*, (6) mandamus, (7) *procedendo*, or (8) *habeas corpus;* (9) and cases of general interest to the public where two or more of the circuit courts of the State have held the law directly opposite on like facts; (10) where the relief sought is damages for personal injury, or (11) for death caused by negligence, and the person injured makes affidavit that he is, or, in case of death, the widow, or any of the next of kin to the deceased, make affidavit that they are

[1] King *v.* Penn, 43 O. S. 57.
[2] Cameron *v.* Francisco, 26 O. S. 190.
[3] Warder *v.* Jacobs, 58 O. S. 77, 81
[4] R. S., sec. 6710
[5] 58 O. S. 81.

dependent for their livelihood upon their daily labor; and in all cases in which a trust fund for the care, support or education of any minor or imbecile person is involved.[1] It is necessary, in order to take the benefit of this provision, that a motion be filed to take a cause out of its order, stating therein the special reasons therefor, except in criminal cases.[2] When a case is reached in its regular order, and there are other cases on the docket involving the same questions, or some of them, the latter may be taken out of their order and disposed of with the case so reached. When a case is disposed of, and again comes into the court, it will be taken up as if it had its original place on the docket.[3]

Sec. 1021. Motion to take case out of order.—Causes in the supreme court will be taken up for decision in their order on the docket, and not otherwise, except on motion duly filed and for special reasons, a cause may be taken out of its order, and assigned for hearing or decision at a particular time, as authorized by statute.[4] A case will not be taken out of its regular order except upon motion filed for that purpose, except in criminal cases, which will be advanced by the court without motion, on the allowance of the filing of the petition.[5] A motion to take a case out of its order and advance it for hearing, will not be entertained on the part of the plaintiff, until it is ready to be submitted by him, nor on the part of the defendant, until the record is printed.[6]

Sec. 1022. Record must be printed in supreme court.—When a petition in error is filed in the supreme court, so much of the record to be reviewed as will show the error complained of must be printed, and ten copies thereof filed with the papers, which printing the plaintiff in error must have done, or he may deposit with the clerk sufficient money to pay the costs thereof; and if he fail for sixty days, after filing the petition, to file such printed copies or to make such deposit, the petition in error will be dismissed, unless the court, on good cause shown, extend the time or dispense with such printing; and the fair expense of such printing will be taxed as a part of the costs. The clerk delivers to the court, at each monthly call of the docket, a list of cases in default for record, which the court calls and makes

[1] R. S., sec. 440.

[2] Rule 2, sec. 5, Rules Supreme Court.

[3] R. S., sec 440. The supreme court construes the statute as applying only to cases which are finally disposed of, and do not return to the court for review. Cockley *v.* Brucker, 54 O. S. 217, 225.

[4] Rule 2, sec. 5, Sup. Ct. Pr.; R. S., sec. 440.

[5] Rule 2, sec. 5, Sup. Ct. Pr.

[6] Rule 2, sec. 9, Sup. Ct. Pr.

such disposition thereof as is provided by statute.[1] A typewritten record is not sufficient compliance with the statute.[2] Where the printing is done under the supervision of the clerk, the matter to be printed should be indicated by a precipe.[3] This is necessary because the clerk could not otherwise know how much of the record should be printed. In printing records economy may be practiced by observing the requirements of the statute and printing only so much of the record as will show the errors complained of. The formal captions, verifications and official certificates, when not material to the question to be adjudicated, may be dispensed with.[4] If the defendant in error is of the opinion that enough of the record is not printed, he may file a motion to require additional matters to be printed. The court will not, in passing upon such motion, enter upon the consideration of the merits of the case to determine whether enough of the record has been printed, for a failure in that regard can in no event operate to his prejudice.[5] The dismissal of a petition in error for want of a printed record is a bar to a second petition in error;[6] and a dismissal of a case for want of record is equivalent to, and in substance is, an affirmation of the judgment of the lower court so far as the rights of the parties to the suit are concerned.[7] The only recourse to be had when a case is dismissed is to file a motion to reinstate it, alleging such excuses as may exist, as sickness or other matters which might warrant the court in reinstating the case on the docket, and extending the time for printing the record. This course, however, receives very little encouragement. An administrator, executor, trustee or guardian prosecuting error may on application have the printing of the record dispensed with, when supported by an affidavit that the estate has no funds with which to pay for the printing.[8]

Sec. 1023. Printed briefs.—The party holding the affirmative is required by rule of the supreme court, within five months after filing the petition in error, to file with the clerk ten printed copies of a brief or argument. The brief must contain a succinct statement of so much of the cause, referring to the pages of the printed record, as is necessary to show how the questions arise, with marginal references to the headings and points made, and whenever the constitutionality or construction of a statute

[1] R. S., sec. 6711.
[2] Hosterman *v.* Butler, 24 W. L. B. 265.
[3] S. C. Rule 5.
[4] Rule 5, S. C.
[5] Keefer *v.* Myers, 59 O. S. 165.
[6] Railroad Co. *v.* Belt, 36 O. S. 94; Atcherly *v.* Dickinson, 34 O. S. 537.
[7] Cohen *v.* Cover, 4 Oh. Dec. 7; s. c. 8 C. C. R. 678.
[8] 91 O. L. 335.

is involved, the brief must contain a copy of such statute. The court may dismiss a cause for want of prosecution when briefs are not filed within rule.[1] The defendant in error is required, if he desires to be heard, to likewise file ten copies of a printed brief within seven months after the filing of the petition in error.[2] Printed briefs are required to be made of additional points or authorities to be made on oral argument, and at the conclusion of the oral argument, time is not allowed for the filing of other or additional briefs.[3]

Sec. 1024. Oral arguments may be had in supreme court, when.—In all cases in the supreme court oral arguments may be heard when either party requests it;[4] but the arguments of counsel may be transmitted to the court, in which case they should be placed on file with the papers and read by the court in the investigation of the cause; and in cases in which the constitutionality of any law of the State is involved, the court will, upon request, allow counsel, not exceeding two on a side in addition to the counsel engaged by the parties, to be heard orally or in writing as such counsel prefer.[5]

Parties desiring to be heard in oral argument, must, in order to have their cases set for oral argument, notify the court of that fact not later than the time for filing of the brief of defendant in error. Notice or request for oral argument must be given at or before the submission of a motion to advance a cause; otherwise oral argument will be considered as waived.[6]

Where oral argument is had, and the briefs on file do not contain all points and authorities intended to be relied upon on oral agreement, counsel is required by rule, five days before the cause is set for hearing, to furnish opposite counsel with a brief statement of any such additional points and authorities intended to be presented.[7]

Sec. 1025. Injunction—When granted by the supreme court.—An injunction is a command to refrain from a particular act, and it may be the final judgment in an action, or may be allowed as a provisional remedy.[8] When it is the final judgment or the very object of the suit, then it is the exercise of original jurisdiction, and the original jurisdiction conferred on the supreme court by the constitution[9] is limited to *quo warranto*, mandamus, *habeas corpus* and *procedendo*. When it is a temporary

[1] Rule 2, sec. 1.
[2] Rule 2, sec. 2.
[3] Rule 2, sec. 8.
[4] Supreme Court Rules, sec. 7.
[5] R. S. sec. 441.
[6] Rule 2, sec. 7, Supreme Ct. Pr.
[7] Rule 2, sec. 8.
[8] R. S., sec. 5571.
[9] Art. 4, sec. 2.

remedy during the pendency of a case on error or on appeal by the supreme court,[1] it is the exercise of appellate jurisdiction,[2] and is intended for the protection of the rights of the parties in a case under review on error, and therefore can be granted by the supreme court. But the power to grant an injunction in a case pending in another court cannot, under the constitution, be conferred on the supreme court;[3] nor does it authorize jurisdiction to be conferred upon or exercised by a judge of such court *at chambers*, which is clearly withheld from the court itself; consequently a judge of the supreme court, at chambers, cannot grant or dissolve an injunction in a cause pending in another court.[4]

Sec. 1026. Weight of evidence not considered.—By positive provision of the code, the supreme court is not required to determine the weight of the evidence in any civil case or proceeding, except when its jurisdiction is original.[5] While it is well understood that the reviewing court will not consider the question whether a verdict or finding is against the weight of the evidence as shown by the bill of exceptions, it may examine the same to ascertain whether or not there was any evidence tending to support the same, as it then becomes a question of law.[6] And so where clear and convincing proof is required, the court will look into the evidence to see whether the rule has been disregarded.[7] A reviewing court will, in the absence of a bill of exceptions, presume any state of evidence consistent with the pleadings such as would justify the verdict given.[8] Where the finding of a trial court, together with all the evidence upon which it is based, shown by a bill of exceptions, is before a reviewing court, and it appears that the facts found by the trial court do not embrace all the material facts disclosed by the bill, when exceptions have been duly entered to such finding, such reviewing court may determine the case from the whole record, including the facts found, and such additional facts as may be warranted by the whole evidence.[9]

[1] As provided in sec. 5573 of the code.

[2] Yeoman *v.* Lasley, 36 O. S. 416. See Kent *v.* Mahaffy, 2 O. S. 498; R. S., sec. 5573; Wagner *v.* Railway Co., 38 O. S. 40.

[3] Kent *v.* Mahaffey. 2 O. S. 498.

[4] Railway Co. *v.* Hurd, 17 O. S. 144.

[5] O. Code, sec. 6710.

[6] House *v.* Elliott, 6 O. S. 497; Willenger *v.* Bramsche, 7 O. C. C. 208; Seville *v.* Wagner, 46 O. S. 52; Ford *v.* Osborne, 45 O. S. 3; Potter *v.* Potter, 27 O. S. 84; Shahan *v.* Swan, 48 O. S. 25. See Blair *v.* Burrows, 23 W. L. B. 180, 203, 222; Ruel *v.* Incline Ry. Co., 25 W. L. B. 232; Whalen *v.* Railway Co., 24 W. L. B. 371; Saldheim *v.* Shane, 24 W. L. B. 428; Finley *v.* Whitley, 46 O. S. 524.

[7] Ford *v.* Osborne, *supra;* Potter *v.* Potter, *supra.*

[8] Kitchen *v* Loudenback, 48 O. S. 177.

[9] Sturgeon *v.* Hull, 8 O. C. C. 269 (1894). See Levi *v.* Daniels, 22 O. S 38.

Sec. 1027. Assessing penalty.—Provision is made in the code authorizing the supreme and circuit courts to assess a penalty for groundless proceedings in error, or those prosecuted without reasonable cause. The supreme court, upon affirming a judgment of the circuit court, may tax as part of the costs a reasonable attorney's fee to the counsel of the defendant, as well as damages in such sum as may seem reasonable, excepting cases where the judgment of the circuit court directs payment of money, in which case it shall bear additional interest, at a rate not exceeding five per centum per annum, for the time it was stayed. But where the court certifies in its judgment that there was reasonable ground for the proceeding in error, no penalty shall be awarded.[1] The circuit court is authorized to render judgment against the plaintiff in error for five per centum upon the amount due the defendant in error, unless the court enter upon its minutes that there was reasonable ground for the proceeding in error.[2] It is the duty of the court to assess a penalty unless it finds that there was reasonable ground for the proceedings in error.[3]

Sec. 1028. Staying execution of judgment.—The mere filing and pendency of a petition in error does not of itself suspend the execution of a judgment,[4] but the same will be suspended only upon good ground therefor being shown;[5] and the filing of a written undertaking to the adverse party,[6] except when error is prosecuted by executors, administrators or guardians, who have given bond in their representative capacity, are not required to enter into an additional undertaking.[7] Where the judgment directs the payment of money, the undertaking must be in double the amount of the judgment and costs;[8] and where a money judgment, rendered in the court of common pleas, is affirmed by the circuit court, the defendant is entitled, upon filing a petition in error in the supreme court, to have the same stayed upon filing the proper bond in the circuit court. The amount of the bond in such cases cannot be fixed by the supreme court.[9] When the judgment directs the execution of a conveyance or other instrument, the undertaking must be in such sum as may be prescribed by a court of record or a judge thereof.[10] And so where it directs the sale or delivery of possession of real property, the bond

[1] O. Code, sec. 6730.
[2] O. Code, sec. 6730.
[3] Brady *v.* Holderman, 19 O. 26.
[4] State *ex rel. v.* Commissioners, 14 O. S. 515; Steube *v.* State, 3 O. C. C. 383.
[5] Building Association *v.* Insurance Co., 34 O. S. 291.
[6] O. Code, sec. 6718.
[7] O. Code, sec. 6721.
[8] O. Code, sec. 6718, subd. 1.
[9] Hyde *v.* Bank, 49 O. S. 60.
[10] O. Code, sec. 6718.

may be fixed by a court of record or a judge thereof.[1] In this case the court of common pleas may fix the bond while the case is pending in the supreme court,[2] and the conditions thereof must be that waste shall not be committed, and that if the judgment be affirmed the value of the use and occupation of the premises shall be paid, and not as in the case of a money judgment.[3] When the judgment directs the assignment or delivery of documents, they may be placed in the custody of the clerk of the court in which the judgment was rendered to abide the judgment rendered on error.[4] A judgment or final order made by a justice of the peace is stayed by the filing of an undertaking to the defendant with the clerk of the court of common pleas. When it directs the delivery of possession of real property, the amount of the bond shall be prescribed by the court of common pleas or a judge thereof, or in his absence by the probate court.[5] In all other cases the execution of a judgment or final order of any tribunal, or the levy or collection of any tax or assessment, may be prescribed by the court in which the petition in error is filed or by a judge thereof.[6] Where a judgment has been reversed by the circuit court, the plaintiff in error in the supreme court shall apply to the court to which the cause has been remanded for further proceedings for a continuance of the case until the final determination in the supreme court.[7]

Sec. 1029. Dismissal of cases and reinstation in supreme court.—When the plaintiff in error fails to file a printed record within the required time the cause shall be dismissed.[8] And so where the plaintiff in error has failed to file printed briefs within the time fixed by rule for filing the same it will also be dismissed, remanded or otherwise disposed of, at the discretion of the court.[9] Causes dismissed for failure to file printed record or argument, in exceptional cases may be reinstated upon a motion filed for that purpose. In presenting such motions the plaintiff in error is required not only to furnish good and sufficient cause for reinstation, but must also show that there is reasonable ground for prosecution of the proceedings in error. He should go into the merits of the case as upon a motion for leave to file

[1] O. Code, sec. 6718.

[2] Gurney *v.* Same, 38 O. S. 658.

[3] O. Code, sec. 6718, subd. 3; Bear *v.* Bookmiller, 3 O. C. C. 484.

[4] O. Code, sec. 6718, subd. 4, 6720.

[5] O. Code, sec. 6724.

[6] O. Code, sec. 6725. When execution is stayed by order of the supreme court, the undertaking must be filed with the clerk of the trial court.

[7] Neubert *v.* Phillips, 46 O. S. 559, Schaeffer *v.* Marienthal, 17 O. S. 183. In Building Ass'n *v.* Insurance Co., 34 O. S. 291, it was held that the execution of an order remanding a cause for further proceedings upon a reversal of judgment may be stayed by the court in which the petition in error is filed.

[8] *Ante*, sec. 1283.

[9] S. C. Rule 2, sec. 2.

a petition in error. The dismissal by the supreme court commission for want of preparation as required by rule, and a motion subsequently made before it for reinstation, is final.[1]

Sec. 1030. Judgment rendered in error.—When a judgment or order made by a justice of the peace is reversed by the court of common pleas, the cause is there retained for trial and final judgment, as in cases of appeal,[2] excepting where the reversal is because the justice had no jurisdiction of the plaintiff in error or of the subject of the action.[3] When a judgment is reversed in whole or in part in the common pleas, circuit or supreme court, the court reversing the same may render the judgment which the court below should have rendered, or remand the cause to the court below for such judgment.[4] Where a judgment is reversed on error for the reason that the court overruled a motion for a new trial, predicated upon the ground that the verdict was contrary to the evidence, the proper judgment would be to set the verdict aside and remand the cause for a new trial.[5] The court below may take the case up at the point where the error was first committed.[6] A judgment of reversal takes effect as of the date of the commencement of the proceedings in error.[7] The reviewing court, upon reversing or affirming a judgment or final order, shall not issue execution, but must send a special mandate to the court below, as the case may require, for execution thereon, and the court to which such special mandate is sent shall proceed in the same manner as if such judgment or final order has been rendered therein;[8] and an authenticated mandate cannot be impeached in the lower court, but the proper remedy is to seek redress in the reviewing court.[9]

Sec. 1031. Rehearing in supreme court.—In the matter of granting rehearing the authorities make a distinction between

[1] Atcherly *v.* Dickinson, 34 O. S. 537.

[2] Robinson *v.* Kious, 4 O. S. 594; O. Code, sec. 6733.

[3] O. Code, sec. 6733; Adams Express Co. *v.* St. John, 17 O. S. 641.

[4] O. Code, sec. 6726. The reviewing court may reverse and render the proper decree before it on the facts as shown by the bill of exceptions. Yeoman *v.* Lasley, 40 O. S. 339. Where the requisite data appears on the face of the record the supreme court may render the judgment which the court below should have rendered. Railroad Co. *v.* Simpson, 5 O. S. 251. But the duty of enforcing such judgment is imposed upon the lower court. Hulett *v.* Fairbanks, 41 O. S. 401. The reviewing court has inherent power to make an order of restitution. Hiler *v.* Hiler, 35 O. S. 645; Bickett *v.* Garner, 31 O. S. 28; Neil *v.* Neil, 38 O. S. 558.

[5] Gay *v.* Davey, 47 O. S. 396; Stivers *v.* Borden, 20 O. S. 232. See, also, Emery *v.* Bank, 25 O. S. 360; Miller *v.* Sullivan, 26 O. S. 639.

[6] Commissioners *v.* Carey, 1 O. S. 463.

[7] Lloyd *v.* Moore, 38 O. S. 96. *Cf.* Rupp *v.* Phillips, 1 O. C. C. 108–11.

[8] O. Code, sec. 6726.

[9] Stevenson *v.* Morris, 37 O. S. 10.

courts of original jurisdiction and those of appeliate jurisdiction only; in the former rehearings have been allowed, and in the latter almost universally refused.[1] The present practice of our supreme court is to grant a rehearing only when one or more of the judges who voted with the majority request that the same be granted.[2] And an application will not be entertained when made at a term subsequent to that at which the judgment was rendered, even though a request therefor be made by one of the judges.[3] Motions for rehearing are not permitted to be filed. The course to pursue is to send to the chief justice six copies of a type-written statement of the reasons why the same should be had.[4]

Sec. 1032. Original jurisdiction of supreme court.—Original jurisdiction is conferred upon the supreme court by the constitution[5] in *quo warranto*, mandamus, *habeas corpus*, and *procedendo*. This is the only original jurisdiction granted by that instrument, and it would be wholly inconsistent with, and, in a great measure, destructive of the judicial system it ordains, to suppose that this original jurisdiction can be enlarged by law. It is limited to that prescribed by the constitution.[6]

Sec. 1033. Can the supreme court refuse to exercise original jurisdiction conferred upon it?—Very early in the history of the court it adopted the practice that it is within the discretion of that court as to whether it will entertain an application for a writ of *habeas corpus*, and that it will only do so when special circumstances render it necessary to settle some important question, and will otherwise refer the parties to the lower courts.[7] And the court has continuously followed this course, and is now holding to the same rule, and is refusing to entertain original cases, not only in *habeas corpus*, but in mandamus. This the court is doing in the face of the constitutional provision conferring this original jurisdiction upon it, and each and every time it refuses to hear such cases, it is trampling upon *absolute constitutional* rights of individuals, and can justify its acts in no other way than that it is the highest judicial body in the State. It is never worth while to take a case to the federal supreme court.

[1] Carey *v.* Kemper, 45 O. S. 94; Longworth *v.* Sturges, 2 O. S. 104.

[2] Commercial National Bank *v.* Wheelock, 31 W. L. B. 208.

[3] Sabin *v.* Cocoran, 52 O. S. 690; Cockley *v.* Brucker, 54 O. S. 224. Rule 20, Rules of Practice, No. 20.

[4] Rule 20, Sup. Ct. Pr.

[5] Art. 4, sec. 2 Const.

[6] Kent *v.* Mahaffy, 2 O. S. 498; Logan Bank, *ex parte*, 1 O. S. 432.

[7] *Ex parte* Shaw, 7 O. S. 81; *Ex parte* Shean, 25 O. S. 440.

When the constitution provided that the court should exercise this jurisdiction, it meant that they should do it, and the people framing the same did not contemplate that they would have their highest court override the constitution.

The fact that the court may have considerable business is no excuse for refusing to exercise this original jurisdiction. It has no discretion whatever.

Sec. 1034. How facts established and testimony taken in cases of original jurisdiction in supreme court.—It is entirely impracticable for the supreme court to hear testimony *viva voce* in cases in which it has original jurisdiction. The issues and facts are generally arranged in such cases by agreement upon the pleadings between the parties. Where such is not the case, and it is necessary to take testimony to establish facts involved in such cases, it is highly proper that the court should direct how this should be done. Consequently the supreme court has formulated a rule that when it is necessary to take testimony in such case, application must be made to the court and an order directing the method of taking testimony obtained.[1] It may be questionable whether or not any court, supreme or other court, has power by rule to deprive a party of a right conferred by positive provision of statute, which authorizes either party to commence taking testimony by deposition at any time after service upon defendant.[2] However justifiable may have been the reasons of the court for adopting such a rule, it cannot override a statute, and parties would be justified in ignoring the rule, although the author coincides in the wisdom thereof in most cases, but in cases of urgency the rights of the parties might be seriously prejudiced thereby.

Sec. 1035. Other rules and statutes applicable to cases of original jurisdiction.—All the rules as to the hearing, and the filing of printed briefs are applicable to cases of original jurisdiction in the supreme court. The record of such cases does not have to be printed, although it is the better practice to do so.

Sec. 1036. Error in criminal cases—Jurisdiction of court of common pleas.—The court of common pleas has jurisdiction to review any judgment or final order of a court or officer inferior to that court in any criminal case, including a conviction for a violation of an ordinance of a municipal corporation.[3]

[1] Rule 2.
[2] R. S., sec. 5266.
[3] R. S. sec. 7356. As to a conviction under a municipal ordinance, see Miller *v.* Bellefontaine, 2 O. C. C. 139; 1 Oh. Cir. Dec. 407.

Sec. 1037. Error in criminal cases—Jurisdiction of circuit court. The circuit court is authorized to review a judgment or final order of any court or officer inferior to the circuit court.[1]

Sec. 1038. Error in criminal cases—Jurisdiction of supreme court.—The supreme court may review a judgment or final order of the circuit court, or the common pleas court in cases of conviction of a felony or a misdemeanor, and the judgment of the circuit court in any other case involving the constitutionality or construction of a statute.[2] The supreme court will ordinarily refuse to hear petitions in error in criminal cases, where the same could as well be presented to the lower courts,[3] although the court under special circumstances may be justified in hearing such cases.

The supreme court has no jurisdiction over proceedings preliminary to the trial, unless the errors complained of appear in the pleadings or orders with respect thereto, or in the final judgment.[4] Error may be prosecuted on exceptions to the rulings of the court on the trial of a criminal case as to the admission or rejection of evidence, or as to the charge of the court, notwithstanding the motion for a new trial does not allege the errors.[5]

Sec. 1039. Error in criminal cases—Judgment or final order, meaning of.—Judgment or final order in the sense of the provision of the statutes relating to error in criminal proceedings, has relation to the final judgment and the orders with respect to the pleadings. A proceeding in error cannot be prosecuted until there has been a final judgment.[6] A decision of the trial court upon the materiality of a variance may be reviewed and reversed if prejudicial to the defendant.[7]

Sec. 1040. Error in criminal cases—Reviewal of cases of conviction.—The statute provides that "cases of conviction of a felony or a misdemeanor" may be reviewed by the supreme court.[8] This language limits the prosecution of error to the defendant when convicted. If a demurrer to an indictment be sustained by the trial court, the same cannot be reviewed on a petition in error.[9]

[1] R. S., sec. 7356.
[2] R. S., sec. 7356.
[3] Bartlett *v.* State, 22 O. S. 205.
[4] Wagner *v.* State, 42 O. S. 537.
[5] Searles *v* State, 6 O. C. C. 331.
[6] Kinsley *v.* State, 3 O S. 508; Cochrane *v.* State, 30 O. S. 61; Wagner *v.* State, 42 O. S. 537.
[7] State *v.* Buechler, 57 O. S. 95.
[8] Sec. 7356.
[9] State *v.* Simmons, 49 O. S. 305.

Sec. 1041. Error in criminal cases—Reviewal of the weight of the evidence.—The statute specially provides that the supreme court shall not in any criminal case be required to determine as to the weight of the evidence.[1] The courts inferior to the supreme court may review a case on the weight of the evidence when the question is properly presented in the record.[2]

Sec. 1042. Transcript to be furnished on demand.—It is made the duty of the clerk upon demand and payment of fees to make and deliver to an accused or his counsel a complete transcript of the record, omitting the bill of exceptions.[3]

Sec. 1043. Petition in error and what must accompany same—Criminal cases.—Proceedings to review criminal cases is by petition in error, to which must be attached a transcript, and also original papers, and the original bill of exceptions. The court is empowered to compel a more complete record to be furnished, and the original papers to be forwarded.[4] It has been held, however, by the circuit courts of the State that the court has no jurisdiction to review a judgment unless the case is presented to the court in the manner prescribed by the statute, to-wit: by a petition in error, to which is attached a certified transcript of the record.[5] And the supreme conrt has held that a certified transcript of the proceedings in criminal procedure must be filed with an application for a writ of error,[6] and that the original files instead of the transcript of the complete record is improper,[7] and a transcript of the journal entries merely not being sufficient.[8]

The statute providing what shall be attached to the petition in error, says that the transcript referred to in the preceding section shall be attached; and the transcript which the statute requires shall be furnished to the accused is "a complete certified transcript of the record, omitting, if so requested, any bill or bills of exceptions."[9] This means only those cases in a court where a complete record is made. A complete record is a record of all the original papers and journal entries, and should be attached to the petition in error, as it is a jurisdictional fact according to the authorities above referred to.[10]

[1] R. S., sec. 7356; Watson *v.* State, 39 O. S. 129; Wagner *v.* State, 42 O. S. 537.

[2] See Flatau *v.* Mansfield, 14 O. C. C. 592.

[3] R. S., sec. 7357.

[4] R. S., sec. 7358.

[5] Brown *v.* State, 2 Oh. Cir. Dec. 402; s. c. 2 O. C. C. 129. In Champion *v.* State, 9 O. C. C. 315; s. c. 6 Oh. Cir. Dec. 82, the court said that a transcript of the complete record should be attached, and if not, the petition would be dismissed. See Ickes *v.* State, 16 O. C. C. 31.

[6] Stanley *v.* State, 23 O. S. 581.

[7] Farris *v.* State, 1 O. S. 188.

[8] Jennings *v.* Mendenhall, 3 O. S. 490.

[9] R. S., sec. 7357.

[10] Brown *v.* State, 2 Oh. Cir. Dec. 402; s. c. 2 O. C. C. 129.

If, however, some kind of a transcript is filed which may not satisfy the requirement, the court is authorized by summary process, to compel a more complete record to be furnished, and such original papers to be forwarded.[1]

There is no doubt but that the statutes contemplate a transcript, not alone of the journal entries accompanied by the original papers, as in civil cases, but a transcript of the entries and of the original papers as well. In one circuit court decision where a case came before the court without a strict compliance with the statutes, it came to the conclusion that as the case had been presented as if properly before it, it would assume jurisdiction ; that while it had been their practice to require a compliance with the statutes, they would not hold that because the transcript was not in proper form, that they had no jurisdiction, but that under the terms of the statute the court might properly, after the filing of the petition without such complete transcript (as a transcript with only the journal entries, as in civil cases), order and require a proper transcript of the record to be filed and then proceed to determine the case.[2] This, no doubt, is the correct practice, and the decisions upon this matter demonstrate the lack of wisdom in unofficial reports. An oral decision is not of the same value as one written under compulsion. And the unofficial reporter's report, make syllabi of too much that is worthless.

Sec. 1044. Summons in error in criminal cases.—A summons in error is issued upon the filing of the petition and precipe, returnable in ten days, unless another day is prescribed by a judge. The requirements are pointed out by the statute.[3]

Sec. 1045. Petition filed as matter of right in common pleas and circuit courts.—Leave to file does not have to be obtained in the common pleas and circuit courts, but petitions in error in criminal cases are there filed as matter of right.

Sec. 1046. Leave to file in supreme court must be obtained.—No petition in error in criminal cases can be filed in the supreme court except upon good cause shown, and upon motion, and notice to the prosecuting attorney and the attorney general, as in civil cases, nor unless such motion be allowed by the court, or in capital cases, by two judges, and in other cases, by one judge.[4] Such motion, with the transcript, and the assignments

[1] R. S., sec. 7358.
[2] Little *v.* State, 4 Oh. Cir. Dec. 285, 1 Dec. 212; s. c. 8 O. C. C. 51.
[3] R. S., sec. 7359.
[4] R. S., sec. 7361.

of error is required by rule to be filed five days before the hearing.[1] All other rules applicable to motions are applicable to this kind of motion.

Sec. 1047. Exceptions by prosecuting attorney.—The statute authorizes the prosecuting attorney to except to any decision of the court and present his bill of exceptions thereto[2] for the purpose of obtaining not a reversal of the judgment and sentence, but a determination of the questions of law involved for future guidance.[3] A decision of the trial judge on a question as to the materiality of a variance between an allegation of an indictment and the evidence offered, may be the subject of an exception under this provision.[4]

Such exceptions, after reasonable notice has been given to the trial judge presiding at the trial, may be presented to the supreme court for decision upon the points involved. If the same is allowed to be filed, the trial judge may appoint some competent attorney to argue the case.[5] If the supreme court should be of the opinion that the questions presented should be decided upon, they shall allow the bill of exceptions to be filed and render decision thereon.[6] The judgment of the court in the case in which the bill is taken shall not be reversed nor in any manner affected ; but the decision of the supreme court shall determine the law to govern in any similar case.[7]

A decision of the common pleas court reversing a sentence imposed by a justice of the peace may be the subject of an exception by the prosecuting attorney, with a view to presenting it to the supreme court to obtain a decision to determine the law to govern in similar cases.[8]

Sec. 1048. Proceedings to reverse order of reversal of conviction in circuit court.—When a conviction for a crime, or a misdemeanor or violation of a city ordinance has been reversed by the circuit court, counsel for the State may take proceedings in error in the supreme court to reverse the order of reversal in the circuit court, and like proceedings shall be had in the supreme court at the hearing of the petition in error as in other cases.[9] This contemplates the reversal by the supreme court of a judgment of the circuit court, reversing a conviction in any court inferior to the circuit court, and requires the filing of a petition

[1] Rule 15.
[2] R. S., sec. 7305.
[3] State *v.* Granville, 45 O. S. 264; State *v.* Simmons, 49 O. S. 305, 309.
[4] State *v.* Buechler, 57 O. S. 95.
[5] R. S., sec 7306.
[6] R. S., sec 7307.
[7] R. S., sec. 7308.
[8] State *v.* Ruedy, 57 O. S. 224.
[9] R. S., sec. 7306*a*.

in error within the time regulated by the general statute.[1] The object of the section is not only to settle the law for the government of future cases, but in the cases contemplated, to obtain a reversal of the judgment of the circuit court.[2] Unconditional authority is conferred upon the attorney for the State to take proceedings in error to the supreme court, in cases of reversal by the circuit court, and leave to file a petition in error in such case need not be obtained.[3]

Sec. 1049. No limitation to error proceedings in criminal cases.—There is no statute limiting the time within which proceedings in error may be prosecuted in criminal cases. And the limitation in the civil code is not applicable to criminal cases.[4]

Sec. 1050. The preparation of the syllabi.—It is a sort of an unwritten rule and a general understanding that the judges of the supreme court prepare the syllabi of reported cases, which are approved by the entire court, and that the same is the law of a case, and that the judge preparing the opinion is responsible therefor, except that the same is read over in the presence of, and is assented to by all the court. The author is not aware nor can he ascertain when this practice was adopted, or whether there was ever anything definitely adopted by the court, but such has been the practice practically since the present constitution. As stated by Okey, J., in *Witte v. Lockwood*, 39 O. S. 141, 145: "Although in this State such head-notes are prepared by the judges, and in all cases receive the assent of a majority . . . they are always to be read in connection with the facts appearing in the report." If the same are in conflict with, or are not supported by the facts, then they are not law, but are on the same basis as *dictum* in an opinion.

The rules of practice of the supreme court provide that a syllabus of the points decided by the court in each cause shall be stated in writing by the judge assigned to prepare the opinion of the court. The syllabus must be submitted to the judges concurring in the decision.[5]

[1] State *v.* Bohn, 55 O. S. 555.
[2] *Id.*
[3] State *v.* Hervey, 59 O. S. 218.
[4] Nickel *v.* State, 6 O. C. C. 601; s. c. 3 O. C. Dec. 605; Blackburn *v.* State, 32 O. S. 581.
[5] Rule 6, Rules of Pr.

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